SUPREME COURT, U.S.
FILED

10-957 JUL 24 2011

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

MARK SHURTLEFF,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

EMMET J. BONDURANT
(*Counsel of Record*)
NICOLE G. IANNARONE
ELIZABETH G. EAGER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 881-4100
Bondurant@bmelaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court of Appeals held that a Utah law requiring registered sex offenders and kidnapping offenders to turn over their Internet identifiers to the State as a condition of registration did not violate the registrants' First Amendment rights. The question presented is:

> Does the First Amendment permit a state to bar sex offenders who are not in prison, on parole, on probation or on supervised relief from communicating anonymously on the Internet?

ADDITIONAL PARTIES TO THE PROCEEDINGS BELOW

The Petitioner is John Doe proceeding under a pseudonym.

The Respondent is Mark Shurtleff, Attorney General for the State of Utah, in his official capacity.

Other parties to the proceeding below are:

Beaver County Prosecutor and Sheriff, in their official capacities; Box Elder County Prosecutor and Sheriff, in their official capacities; Cache County Prosecutor and Sheriff, in their official capacities; Carbon County Prosecutor and Sheriff, in their official capacities; Daggett County Prosecutor and Sheriff, in their official capacities; Davis County Prosecutor and Sheriff, in their official capacities; Duchesne County Prosecutor and Sheriff, in their official capacities; Emery County Prosecutor and Sheriff, in their official capacities; Garfield County Prosecutor and Sheriff, in their official capacities; Grand County Prosecutor and Sheriff, in their official capacities; Iron County Prosecutor and Sheriff, in their official capacities; Juab County Prosecutor and Sheriff, in their official capacities; Kane County Prosecutor and Sheriff, in their official capacities; Millard County Prosecutor and Sheriff, in their official capacities; Morgan County Prosecutor and Sheriff, in their official capacities; Piute County Prosecutor and Sheriff, in their official capacities; Rich County Prosecutor

ADDITIONAL PARTIES TO THE PROCEEDINGS BELOW – Continued

and Sheriff, in their official capacities; Salt Lake County Prosecutor and Sheriff, in their official capacities; Saupete County Prosecutor and Sheriff, in their official capacities; Sevier County Prosecutor and Sheriff, in their official capacities; Summit County Prosecutor and Sheriff, in their official capacities; Tooele County Prosecutor and Sheriff, in their official capacities; Uintah County Prosecutor and Sheriff, in their official capacities; Utah County Prosecutor and Sheriff, in their official capacities; Wasatch County Prosecutor and Sheriff in their official capacities; Washington County Prosecutor and Sheriff in their official capacities; Wayne County Prosecutor and Sheriff in their official capacities; Weber County Prosecutor and Sheriff in their official capacities; and Tom Patterson, Executive Director, Utah State Department of Corrections, in his official capacity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
ADDITIONAL PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT	9
I. Strict scrutiny is the appropriate standard of review for laws requiring registrants to turn over their Internet identifiers	9
A. The circuit court's application of the secondary effects test conflicts with prior decisions of this Court and deepens an emerging circuit split	9
B. The application of intermediate scrutiny conflicts with this Court's prior precedent protecting anonymous speech	18
II. The Court should clarify that requiring anonymous speakers to disclose their identity to the government or the public when the substance of their anonymous communications is available chills speech	20

TABLE OF CONTENTS – Continued

Page

A. Laws requiring a party to turn over anonymous identifiers when the substance of his anonymous communications is available chill speech 21

B. The circuit court's construction of Utah's law extends the "readily susceptible" canon of construction beyond the limits recognized by this Court 24

III. This Petition presents issues of national importance affecting the First Amendment rights of thousands of American citizens 27

CONCLUSION 28

TABLE OF APPENDICES

Tenth Circuit Order, Opinion and Judgment, December 1, 2010 ..... App. 1

Tenth Circuit Opinion and Judgment, October 26, 2010 ..... App. 21

District of Utah Opinion and Order, August 20, 2009 ..... App. 38

District of Utah Opinion and Order, September 25, 2008 ..... App. 54

TABLE OF AUTHORITIES

Page

CASES

American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10th Cir. 2000) 8

Boos v. Barry, 485 U.S. 312 (1988) 10, 11, 13, 14, 16

Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) 22, 23

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 14

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 9, 10, 11, 12, 17

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 10, 13, 16, 17

Connection Distrib. Co. v. Holder, 557 F.3d 321 (6th Cir. 2009) 15

Doe v. Nebraska, ___ F. Supp. 2d ___, 2010 WL 3259366 (D. Neb. Aug. 16, 2010) 6

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002) 15

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) ..... *passim*

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 16, 17

Reno v. ACLU, 521 U.S. 844 (1997) 23

Talley v. California, 362 U.S. 60 (1960) 20, 21

TJS of New York, Inc. v. Town of Smithtown, 598 F.3d 17 (2d Cir. 2010) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Stevens, ___ U.S. ___, 130 S. Ct. 1577 (2010) 24, 25

Virginia v. Am. Booksellers Ass'n, 484 U.S. 383 (1958) 25

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 19

White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) 5, 6

Young v. Am. Mini Theatres, 427 U.S. 50 (1976) 11, 12

CONSTITUTION

U.S. Const. amend. I 2, 14, 18, 21, 27

STATUTES

Alaska Stat. § 12.63.010 6

Ariz. Rev. Stat. Ann. § 13-3821(I) 6

Colo. Rev. Stat. § 16-22-108(2.5) 6

Conn. Gen. Stat. § 54-251(a) 6

Conn. Gen. Stat. § 54-252(a) 6

Conn. Gen. Stat. § 54-253(b) 6

Conn. Gen. Stat. § 54-254(a) 6

Del. Code Ann. tit. 11 § 4120(d)(2) 6

Fla. Stat. § 943.0435(b) 6

Haw. Rev. Stat. § 846E-2(d)(5) 6

TABLE OF AUTHORITIES – Continued

Page

730 Ill. Comp. Stat. 150/3 6
Ind. Code § 11-8-8-8(a)(7) 6
Iowa Code § 692A.101 6
Iowa Code § 692A.104(1) 6
Kan. Stat. Ann. § 22-4907 6
Ky. Rev. Stat. Ann. § 17.500(6) 6
Ky. Rev. Stat. Ann. § 17.510 6
La. Rev. Stat. Ann. § 15:542(C)(1)(m) 6
Md. Code Ann. Crim. Proc. § 11-706 6
Miss. Code Ann. § 45-33-25 6
Mo. Ann. Stat. § 589.402(3)(10) 6
Neb. Rev. Stat. § 29-4006(k) 6
N.H. Rev. Stat. Ann. § 651-B:4-a 6
N.Y. Correct. Law § 168-b(a) 6
N.C. Gen. Stat. § 14-208.7(b)(7) 6
Ohio Rev. Code Ann. § 2950.04(C)(10) 6
Okla. Stat. tit. 57 § 584(A)(9) 6
S.C. Code Ann. § 23-3-555(B)(1) 6
S.D. Codified Laws § 22-24B-8(13) 6
Tenn. Code Ann. § 40-39-203(i)(17) 6
Tex. Code Crim. Proc. Ann. art. 62.051(c)(7) (West) 6
Utah Code Ann. § 31A-40-104 26
Utah Code Ann. § 59-1-404(7)(a) 26

TABLE OF AUTHORITIES – Continued

Page

Utah Code Ann. § 59-1-404(7)(c) 26
Utah Code Ann. § 59-14-606(3) 26
Utah Code Ann. § 63A-8-201(4)(l) 26
Utah Code Ann. § 63G-2-206 26
Utah Code Ann. § 77-27-21.5 ..... 2, 4, 5, 6, 25
Va. Code Ann. § 9.1-903(b) 6
W. Va. Code § 15-12-2(d)(8) 6
Wis. Stat. § 301.45(2)(6m) 6
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(c) 2
42 U.S.C. § 16915a(a) 7
42 U.S.C. § 16925(a) 7

RULES

Sup. Ct. R. 13.1 2

OTHER AUTHORITIES

Ga. Legis. 389 § 5 ..... 5, 7

Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment*, 63 U. CHI. L. REV. 413 (1996) 13

National Center for Missing & Exploited Children, Registered Sex Offenders in the United States per 100,000 Population, available at http://www.missingkids.com/en_US/documents/sex-offender-map.pdf (last visited January 19, 2011) 27

PETITION FOR WRIT OF CERTIORARI

John Doe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinion of the Court of Appeals for the Tenth Circuit was filed on October 26, 2010. This opinion is reproduced in the appendix (App. 21-37). Petitioner moved for panel rehearing and rehearing en banc. The Tenth Circuit granted the motion for panel rehearing in part and filed an amended opinion on December 1, 2010, which was officially reported at ___ F.3d ___, 2010 WL 4888036 and is reproduced in the appendix (App. 1-20).

The District Court granted petitioner an injunction on September 25, 2008. The opinion of the District Court granting the preliminary injunction is unpublished and reproduced in the appendix (App. 54-76). After the District Court granted the preliminary injunction, Utah's legislature changed the provisions of the relevant law. Respondent subsequently asked the District Court to vacate the injunction, and on August 20, 2009, the District Court granted Respondent's motion. This opinion is unpublished and reproduced in the appendix (App. 38-53).

JURISDICTION

The judgment of the circuit court sought to be reviewed was originally entered on October 26, 2010. On December 1, 2010, the circuit court granted in part Petitioner's request for rehearing, and entered an amended and superseding opinion. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because this petition is being filed within 90 days of the entry of the judgment sought to be reviewed. This court has jurisdiction to review the judgment of the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech."

Section 77-27-21.5 of the Utah Code Annotated provides in pertinent part that:

(1) As used in this section:

* * *

(j) "Online identifier" or "Internet identifier":

(i) means any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication; and

(ii) does not include date of birth, Social Security number, PIN number, or Internet passwords.

* * *

(2) The department, to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders, shall:

(a) develop and operate a system to collect, analyze, maintain, and disseminate information on offenders and sex and kidnap offenses;

(b) make information listed in Subsection (27) available to the public; and

(c) share information provided by an offender under this section that may not be made available to the public under Subsection (27), but only:

(i) for the purposes under this Subsection (2); or

(ii) in accordance with Section 63G-2-206.

* * *

(14) An offender shall provide the department or the registering entity with the following information:

* * *

(i) Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings;

(j) the name and Internet address of all websites on which the offender is registered using an

online identifier, including all online identifiers used to access those websites. . . .

STATEMENT OF THE CASE

Before the court is an issue that directly implicates the First Amendment rights of thousands of citizens in at least thirty states. In its decision below, the Tenth Circuit upheld a Utah law[1] that requires all registered sex offenders to surrender their e-mail addresses, chat names, instant messenger names, as well as any other identifiers they use to speak on the Internet. By upholding the law, the circuit announced an opinion that conflicts with a federal district court and undermines rulings announced by this Court. Banning registrants from speaking on the Internet – unless they relinquish their identifiers to the State – restricts individuals' ability to speak anonymously. Individuals ensnared by such laws include men and women like the Petitioner, who has completed his sentence, but is nonetheless forever prohibited from expressing *any* views – political or otherwise – anonymously on the web.

Since 2008, Utah has required registrants to disclose their Internet identifiers when registering, forcing registrants to give up the identifiers that tie them to their otherwise anonymous speech on the

[1] Utah Code Ann. § 77-27-21.5.

Internet. Utah Code Ann. §§ 77-27-21.5(14)(i)-(j). For example, under Utah's law a registrant must disclose to the government a username he uses to comment on news stories on a newspaper's website, even if no one else in the world knows that the registrant is the person tied with the identifier. Similarly, a registrant who writes anonymously in online forums advocating for reform to sex offender registration laws must disclose his identifier, even though the identifiers tie him to political speech. Finally, a registrant who writes an anonymous blog criticizing the government must disclose his blogging pseudonym to the government he criticizes. If a registrant communicates through identifiers he has not disclosed to the State, he has committed a felony by providing the State with incomplete registration information and can be imprisoned for up to five years. *Id.* § 77-27-21.5(16).

Other than the district court opinions below, the Tenth Circuit is the third federal court to weigh in on whether requiring registrants to disclose their Internet identifiers violates the Constitution. Georgia previously required registrants to turn over their Internet identifiers and passwords, but after a district court enjoined enforcement of the law, *see White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010), the Georgia legislature removed the provisions requiring registrants to disclose their Internet identifiers, *see* Ga. Legis. 389 § 5. Relying on this Court's precedents, the *White* Court reasoned that "[t]he First Amendment secures to persons in our country a constitutional

right to anonymous free speech." *White*, 696 F. Supp. 2d at 1303. The Court further observed that "[t]his principle is firmly embedded in First Amendment jurisprudence." *Id.* Nebraska requires registrants to turn over their Internet identifiers, and a district court there denied cross motions for summary judgment and will hold a trial to determine the law's constitutionality. *Doe v. Nebraska*, ___ F. Supp. 2d ___, 2010 WL 3259366 (D. Neb. Aug. 16, 2010). Petitioner urges this Court to adopt *White*'s reasoning, for it best comports with this Court's jurisprudence and its commitment to free speech.

The issues raised in this petition are one of national importance. In the past few years, the majority of states have enacted similar laws,[2] and the federal

[2] Alaska Stat. § 12.63.010; Ariz. Rev. Stat. Ann. § 13-3821(I); Colo. Rev. Stat. § 16-22-108(2.5); Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-253(b), 54-254(a); Del. Code Ann. tit. 11 § 4120(d)(2); Fla. Stat. § 943.0435(b); Haw. Rev. Stat. § 846E-2(d)(5); 730 Ill. Comp. Stat. 150/3; Ind. Code § 11-8-8-8(a)(7); Iowa Code §§ 692A.101, 692A.104(1); Kan. Stat. Ann. § 22-4907; Ky. Rev. Stat. Ann. §§ 17.500(6), 17.510; La. Rev. Stat. Ann. § 15:542(C)(1)(m); Md. Code Ann. Crim. Proc. § 11-706; Miss. Code Ann. § 45-33-25; Mo. Ann. Stat. § 589.402(3)(10); Neb. Rev. Stat. § 29-4006(k); N.H. Rev. Stat. Ann. § 651-B:4-a; N.Y. Correct. Law § 168-b(a); N.C. Gen. Stat. § 14-208.7(b)(7); Ohio Rev. Code Ann. § 2950.04(C)(10); Okla. Stat. tit. 57 § 584(A)(9); S.C. Code Ann. § 23-3-555(B)(1); S.D. Codified Laws § 22-24B-8(13); Tenn. Code Ann. § 40-39-203(i)(17); Tex. Code Crim. Proc. Ann. art. 62.051(c)(7) (West); Utah Code Ann. § 77-27-21.5; Va. Code Ann. § 9.1-903(b); W. Va. Code § 15-12-2(d)(8); Wis. Stat. § 301.45(2)(6m). Georgia previously required registrants to turn over their Internet identifiers and passwords, but after a district court enjoined enforcement of the law, *see White v. Baker*, 696

(Continued on following page)

government compels states to collect Internet identifiers or give up certain federal funding, *see* 42 U.S.C. §§ 16915a(a), 16925(a). Courts need immediate guidance in grappling with these "untested legal waters." App. 64. A "well-established constitutional right" hangs in the balance. *Id.* 65. Petitioner asks this Court to review two conclusions that the circuit court reached: (1) that intermediate scrutiny, not strict scrutiny, applies to Utah's law and (2) that requiring registrants to turn over their Internet identifiers does not chill speech. These conclusions contradict prior decisions of this Court and impermissibly narrow the protections of the First Amendment.

The district court's ruling. The district court initially enjoined enforcement of an earlier version of Utah's law requiring registrants to disclose their Internet identifiers and passwords. *See* App. at 76. The Court explained, "'Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.'" App. 65 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).) In response to the district court's ruling, Utah amended its law to remove the

---

F. Supp. 2d 1289 (N.D. Ga. 2010), the Georgia legislature removed the provisions requiring registrants to disclose their Internet identifiers, *see* Ga. Legis. 389 § 5.

requirement that registrants disclose their passwords. Concluding that the amended law did not violate Petitioner's constitutional rights, the district court vacated the injunction. App. at 45-48, 53. Making an analogy to speakers who commit libel on the Internet, the district court held "the protection afforded to anonymous Internet users must be related to the importance of the type of speech." *Id.* at 46.

The court of appeals' ruling. Petitioner appealed the district court's order to the Tenth Circuit. The Tenth Circuit applied intermediate scrutiny and ruled that Utah could collect Internet identifiers from registrants. *Id.* at 28-30. Petitioner sought rehearing, and the circuit court panel revised its analysis of Petitioner's First Amendment claims. In its revised decision, the circuit court put forth a new justification (which the parties never argued or briefed) for the application of intermediate scrutiny, holding that Utah's law targets the secondary effects of speech. *Id.* at 9-11. The court of appeals purported to follow its earlier decision in *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), where it applied the "secondary effects" test to a law requiring professional fundraisers to register with the state. The circuit court concluded Utah's law was content-neutral regulation because the law's purpose was to "aid[ ] the police in solving crimes." App. at 10-11. The court of appeals further disregarded Petitioner's injury when it concluded that Utah did not chill his speech even though Petitioner was required to turn his identifiers over to the State, which could then use

them to access his anonymous communications. *Id.* at 12-16.

Petitioner now seeks a writ of certiorari.

REASONS FOR GRANTING WRIT

I. Strict scrutiny is the appropriate standard of review for laws requiring registrants to turn over their Internet identifiers.

Under this Court's precedent, the secondary effects test permits courts to apply a relaxed standard of review (intermediate, instead of strict, scrutiny) to content-based restrictions that regulate the secondary effects of speech. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (plurality). In other words, the secondary effects test creates a legal "fiction" that content-based restrictions are actually content neutral. *See id.* at 448 (Kennedy, J., concurring). When a court applies the secondary effects test, it applies a standard of review more favorable to the government than it would have applied in the absence of the secondary effects test.

A. The circuit court's application of the secondary effects test conflicts with prior decisions of this Court and deepens an emerging circuit split.

The Tenth Circuit held that the secondary effects test permitted it to review Utah's law under the

relaxed standard of intermediate scrutiny. *See* App. at 8. However, the application of the secondary effects test is an overly broad extension of this Court's prior decisions, including *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) and *Alameda Books, Inc.*, 535 U.S. 425. Moreover, the circuit court's opinion deepens a circuit split regarding the application of the secondary effects test.

Even though Utah's law regulates whether registrants can speak anonymously, not where adult businesses can be located, the circuit court applied the secondary effects test to justify using intermediate scrutiny, expanding the limits this Court has placed on the secondary effects test. This Court's decisions explicitly limit the secondary effects test to zoning ordinances targeting adult entertainment businesses. *See Renton*, 475 U.S. at 47-49 ("with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' . . . regulations"); *see also Alameda Books*, 535 U.S. 425 (plurality); *Boos v. Barry*, 485 U.S. 312, 334-35 (1988) (Brennan, J., concurring) ("I . . . object to Justice O'Connor's assumption that the *Renton* analysis applies [] outside the context

of businesses purveying sexually explicit materials. . . . ").[3] The Court recognized that the secondary effects test only justified relaxing the standard of review for cases involving zoning regulations, and Utah's law does not fall within those limited parameters.

This Court created the secondary effects test to balance the unique interests presented by zoning laws that implicate free-speech rights, and the test should be limited to contexts where those same interests are at play. The secondary effects test grew out of the government's unique power in zoning "to meet effectively the increasing encroachment of urbanization on the life of their citizens." *Young v. Am. Mini Theatres*, 427 U.S. 50, 74 (1976) (Powell, J., concurring). As Justice Kennedy has explained, urban planning (i.e. zoning) routinely results in restrictions that single out specific businesses. However, these restrictions "target[ ] not the business but its particular noxious side effects." *Alameda Books*, 535 U.S. at 446 (Kennedy, J., concurring). The unique government interest in zoning justifies the secondary effects test's relaxed standard of review: zoning regulations "have a prima facie legitimate purpose: to limit the negative externalities of land use." *Id.* at 449. Because of the unique nature of zoning regulations,

---

[3] Justice O'Connor authored the plurality opinion in *Boos*, and a majority of the Court did not join the portion of Justice O'Connor's opinion applying the secondary effects test. *See Boos*, 485 U.S. 312.

Justice Powell explained that zoning restrictions applied to adult entertainment businesses are "not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case." *Young*, 427 U.S. at 76 (Powell, J., concurring).

The secondary effects test accounts for the specific way zoning regulations affect speech. Zoning regulations do not outlaw a specific type of speech but instead only direct where the speech can occur. So, permissible zoning regulations under the secondary effects test "leave the quantity and accessibility of the speech substantially unlimited." *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring).

When the circuit applied the secondary effects test to Utah's registration law, it expanded the test in a context where a relaxed standard of review is inconsistent with First Amendment jurisprudence. Unlike zoning restrictions that simply move, but do not eliminate, the quantity or accessibility of speech, Utah's law restricts speech. Utah's law prohibits registrants from communicating anonymously, resulting in a chilling effect upon their speech and government control over the modes through which registrants can express themselves. In contrast, zoning restrictions do not control how adult entertainment businesses can communicate but simply where those communications can occur.

The harmful effects of broadly applying the secondary effects test cannot be overstated. By relaxing

the standard of review courts apply, the secondary effects test cuts away at the protection strict scrutiny affords free speech. Indeed, the secondary effects test can be manipulated easily to justify a relaxed standard of review for nearly any restriction on speech. Because the test looks solely at whether under the government's stated purpose for enacting the regulation the law is targeted at the primary or secondary effects of speech, savvy governments can enact laws impermissibly limiting speech by setting forth a secondary effects pretext for the law: "secondary effects offer countless excuses for content-based suppression. . . . The *Renton* analysis, however, creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Boos*, 485 U.S. at 335 (Brennan, J., concurring). Similarly, as then Professor Kagan warned, a broad application of the secondary effects test could eviscerate the protection strict scrutiny affords free speech by turning "every First Amendment case into a secondary effects case, given that the government can always proffer a justification based on harm." Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment*, 63 U. CHI. L. REV. 413, 485-86 (1996).

Indeed, Justice Brennan criticized the *Boos* plurality for applying the secondary effects test applied to a law prohibiting individuals from foreign government (although the plurality ultimately concluded the law targeted the primary, not secondary

effects of speech), warning that even considering the secondary effects test created "ominous dictum, for it could set the Court on a road that will lead to the evisceration of First Amendment freedoms." *Id.* at 337.

In the rare instances where this Court has considered whether laws other than zoning restrictions regulate the secondary effects of speech, this Court has ultimately concluded that the constitutionally protected primary effects of speech were in fact infringed. In other words, the only times that this Court has applied intermediate scrutiny to laws as a result of the secondary effects test are when the laws govern zoning of adult entertainment businesses. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (rejecting argument that ban on commercial handbill newsracks targeted secondary effects of commercial newsracks); *Boos*, 485 U.S. 312 (plurality) (rejecting argument that law prohibiting individuals from carrying signs critical of foreign government targeted secondary effects of such speech, concluding instead law was focused on primary effect of such speech).

By applying the secondary effects test outside the context of zoning restrictions on adult entertainment businesses, the circuit court's decision deepens a split between the Sixth and Tenth Circuits, on the one hand, and the Second and Fourth Circuits, on the other, regarding the scope of the secondary effects test. Like the Tenth Circuit, the Sixth Circuit has not limited the secondary effects test to zoning

restrictions for adult businesses. *See Connection Distrib. Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc) (applying secondary effects test to law requiring publisher of adult magazine to keep records verifying ages of individuals placing personal advertisements). But, the Second and Fourth Circuits continue to tether the secondary effects test to the limits this Court has recognized. *See TJS of New York, Inc. v. Town of Smithtown*, 598 F.3d 17, 20-21 (2d Cir. 2010). Judge Calabresi emphasized that the secondary effects test is limited in scope because it permits government to regulate speech in ways that would "almost certainly be unconstitutional if applied to pure political speech." *Id.* at 21; *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 513-14 (4th Cir. 2002).

In addition to improperly expanding the secondary effects test to scenarios outside of the limited context of zoning regulations, the circuit court also improperly expanded the secondary effects test by determining that the Utah law was only aimed at the secondary effects of a registrants' speech. The stated purpose for Utah's law is to monitor registrants' Internet communications so that after an abduction or sex-related crime law enforcement can quickly determine if a registrant had communicated with the victim. App. at 11. This purpose is directed at the primary, not secondary, effect of the speech. A law targets the secondary effects where "[t]he content of

the [regulated speech] was irrelevant and was not the target of the regulation." *Boos*, 485 U.S. at 320. Utah is regulating registrants' otherwise anonymous Internet communications because it is concerned that the content of those communications may be evidence of illegal acts or used in the course of a crime. Utah is not regulating this speech due to some reason merely correlated with the Internet communications.

As this Court has made clear, where the communications being regulated are the target of the law, the law is not directed to the secondary effects of the speech. This Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992), illustrates why Utah's law targets the primary effects of speech. In *R.A.V.*, the Court considered whether a law banning cross burning was targeted at the secondary effects of speech. While, like in *Renton*, the purpose of the law was preventing crime, the law in *R.A.V.* was not targeted at the secondary effects of speech because the law outlawed cross burning to prevent criminal reprisals that resulted from the communication (i.e., responses to the "particularly odious message" of cross burning). *Id.* at 394 n.7. Because the purpose of regulation was to target the direct results of the speech being restricted, strict scrutiny applied.

In contrast, in *Renton*, a law restricting where businesses showing adult movies could be located targeted the secondary effects of speech, because the justification for the law was not that showing adult

movies caused crime but rather areas where adult movie theaters were present tended to be areas of high crime. *Renton*, 475 U.S. at 48; *see Alameda Books*, 535 U.S. at 463 (Souter, J., dissenting) (discussing secondary effects as when there is a correlation between the government's interest and the regulated speech). In other words, the purpose of the law was to "prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life." *Renton*, 475 U.S. at 48. In contrast, Utah seeks to regulate registrants' anonymous Internet speech because it believes that it can use the content of the otherwise anonymous Internet speech as a tool in its investigations. App. at 11.

Like with the restriction on cross burning in *R.A.V.*, Utah's justification for collecting Internet identifiers relates directly to the content of registrants' speech. Utah wants access to registrants' Internet identifiers so that it can determine if the identifiers were used as a tool in abduction or sex-related crimes. Utah's crime-fighting purposes relate directly to the content of registrants' Internet speech, so it targets the primary – not secondary – effects of such speech.

The circuit court dramatically expanded the scope of the secondary effects test, which was never briefed by the parties, and the circuit court failed to justify its decision in light of this Court's prior precedent. This Court should grant the Petition to make

clear that the secondary effects test cannot be so broadly applied in circumstances outside those narrow instances this Court previously recognized.

B. The application of intermediate scrutiny conflicts with this Court's prior precedent protecting anonymous speech.

The right to speak anonymously is at the First Amendment's core.

> Anonymity is a shield from the tyranny of the majority. See generally J. Mill, On Liberty and Considerations on Representative Government (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression at the hand of an intolerant society.

McIntyre, 514 U.S. at 357.

Because of the unique nature of anonymous speech, this Court has treated an author's decision to speak anonymously as part of the content of speech. A speaker's decision to communicate anonymously is "like other decisions concerning omissions or additions to the content of a publication." *Id.* at 342. "Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *Id.* The Founding Fathers

recognized the communicative power of pseudonyms when they (*e.g.*, the authors of the Federalist Papers' writings as Publius or Benjamin Franklin's writings as "Silence Dogood") chose to publish their commentary anonymously. *See id.* at 343 n.5. As this Court has explained, the decision to communicate anonymously is inexorably bound up with the content of speech: "identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue." *Id.* at 355. Simply put, the identity of a speaker is part of the message or content of the speech.

Under this framework, Utah's law is a content-based regulation because "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The circuit court's conclusion that Utah's law restricting anonymity did not target the message of the regulated speech ignored that the decision to communicate anonymously is itself part of the message of the speech.

The circuit court's decision also ignored that the historical importance of anonymous speech justifies treating it as content and applying strict scrutiny to laws regulating anonymous speech. As this Court's prior decisions have explained in painstaking detail, since before the founding of the country, speakers have engaged in anonymous speech to criticize the government: "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or

not at all." *Talley v. California*, 362 U.S. 60, 64 (1960). *See also McIntyre*, 514 U.S. at 360-61 (Thomas, J., concurring) ("historical evidence indicates the Founding-era Americans opposed attempts to require that anonymous authors reveal their identities").

The issue in this Petition is whether the historical protection afforded to anonymous speech will be extended to the Internet. This Court should clarify that anonymous speech on the Internet is protected because the justifications for protecting anonymous speech offline apply with equal force to anonymous speech online.

II. The Court should clarify that requiring anonymous speakers to disclose their identity to the government or the public when the substance of their anonymous communications is available chills speech.

The circuit court concluded Utah's law survived intermediate scrutiny because if Utah tied Petitioner with his identifiers it "[would] not unnecessarily interfere with his First Amendment freedom to speak anonymously," and would not have a chilling effect because no disclosure is being made to the public. App. at 14. The circuit court improperly limited this Court's prior precedent by finding that there is no chilling effect upon speech where disclosure of a speaker's identity is only made to the government.

Disclosure to either the government or the public is sufficient to result in a chilling effect. *See Talley*,

362 U.S. at 65 ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"). While some speakers choose to communicate anonymously to protect themselves from "social ostracism," *see McIntyre*, 514 U.S. at 342, others speak anonymously to protect themselves from the government. Indeed, a speaker's right to shield his identity from the government is one of the underlying tenets of the First Amendment:

> The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English controlled courts.

Talley, 362 U.S. at 64.

A. Laws requiring a party to turn over anonymous identifiers when the substance of his anonymous communications is available chill speech.

Utah's law has a chilling effect on speech because registrants will not engage in Internet communications when the government can then tie them to the substance of their otherwise anonymous communications. The circuit court concluded there was no chilling effect because the government would only access Internet identifiers after the communication

was made. App. at 15. But, the fact that Utah can tie registrants to the substance of their speech after it is made creates a chilling effect. This Court should expound upon its previous holdings in *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999), and make clear that there is a chilling effect when the law compels an anonymous speaker to give up his anonymity while the contents of his communications are available.

It is improper for a government to force an anonymous author to reveal his identity when the content of the anonymous speech is available. But, the circuit court's reasoning would require the anonymous author of any recorded or published communication to reveal his identity after the works were published. However, such laws are not permitted. As Justice Thomas noted, when a colonial government tried to prosecute John Paul Zenger for libel when he refused to identify the anonymous authors whose works he published, he was found not guilty. *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring).

The circuit court incorrectly applied the Court's existing precedent because it assumed Internet communications are akin to one-time, face-to-face communications that will never be accessed again as opposed to recorded and published communications like books and pamphlets. *See* App. at 15. While the substance of face-to-face communications are fleeting, Internet communications are perpetually available, like books, and their substance can be accessed hours, days, weeks, months, or years after the speaker first

"publishes" the communication. *See generally Reno v. ACLU*, 521 U.S. 844, 851-52 (1997). Thus, speech made over the Internet, unlike face-to-face communications, is made not only when first posted, but each moment it can be accessed, just like a book or other recorded message.

In *Buckley*, this Court considered two different regulations on anonymous speech: one requiring petitioners to wear name badges when speaking and the other requiring petitioners to disclose their identities in affidavits after they concluded speaking. 525 U.S. at 198-99. The badge requirement chilled speech while the affidavit requirement did not. While the name badge requirement "operates when reaction to the circulator's message is immediate and 'may be at the most intense, emotional, and unreasoned,'" in contrast the affidavit "does not expose the circulator to the risk of 'heat of the moment' harassment." *Id.* The difference between the two regulations was that the name badge requirement, unlike the affidavit requirement, forced the anonymous speaker to disclose his identity at the same time he was communicating the substance of his anonymous speech and directly tied him to the content of the speech, but the affidavit did not.

The Tenth Circuit incorrectly limited *Buckley* because it treated Internet speech like a face-to-face communication even though the content of the Internet speech is accessible long after it is made. This Court should grant the petition to resolve the important and emerging issue of when disclosure of anonymity in

Internet communications chills speech. Because Utah's law gives law enforcement the tools to tie registrants to the substance of their anonymous speech, the law chills speech.

B. The circuit court's construction of Utah's law extends the "readily susceptible" canon of construction beyond the limits recognized by this Court.

The circuit court essentially conceded that if registrants' Internet identifiers are available to the public, there will be a chilling effect on speech. App. at 15-16. But, the circuit court avoided holding Utah's law unconstitutional by concluding that under a "readily susceptible" interpretation, Utah's law did not permit registrants' Internet identifiers to be disclosed to the public. However, the circuit court's application of the readily susceptible canon of construction is inconsistent with the plain language of Utah's statute and improperly expanded the limits this Court announced last term in *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577 (2010).

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1958) (internal cites omitted). A statute is not "readily susceptible" to a narrowing construction when the construction that saves the constitutionality of the statute requires rewriting the statute's plain, unambiguous language. *Stevens*, 130 S. Ct. at 1591-92.

Utah's law sets out when the government can "share information provided by [a registrant] under this section that may not be made available to the public under Subsection (27), but only: (i) for the purposes under this Subsection (2); or (ii) in accordance with Section 63G-2-206." Utah Code Ann. § 77-27-21.5(2)(c). Nowhere does subsection 2 – or any other provision in Utah's registration law – state that the information that may be "share[d]" can only be provided to law enforcement officials.

Nevertheless, the circuit read into the statute a limitation not contained within its plain language and decided that the Utah law only permits Internet identifiers to be shared with other government officials. This revision to the statute is not simply a "reinterpretation," but adds qualifying language, inserting a limit on with whom the government can share the information not found with the statute's text.

The circuit court construed Utah's law concluding that "[n]owhere in the Utah code is 'share' used to indicate the unrestricted disclosure of information to the general public." App. at 15. However, whenever Utah's legislature intends to limit with whom the

government can "share" information, it has said so in the plain language of the statute. *See* Utah Code Ann. §§ 31A-40-104 (specifying state departments and commissions with whom Insurance Commissioner may "share" information); 59-1-404(7)(a) (specifying persons with whom commercial information related to property taxes maybe shared); 59-1-404(7)(c) (specifying government entities with whom government entities may share commercial information gathered from tax returns); 59-14-606(3) (permitting information related to tax stamping for cigarettes and tobacco to be shared "with federal, state, or local agencies as necessary"); 63A-8-201(4)(l) (permitting records to be shared "with private sector vendors under contract with the state to assist state agencies in collecting debts owed to the state agencies"); 63G-2-206 (defining when and to whom a governmental entity may share a private record).

The effect of the circuit's decision is that it has rewritten Utah's law. But, even more troublingly, Utah is not bound by the circuit's decision on how to interpret its law. So, Petitioner is denied injunctive relief, but, at the same time, he has no comfort or assurances that Utah will abide by the narrowing "interpretation" applied by the circuit court.

III. This Petition presents issues of national importance affecting the First Amendment rights of thousands of American citizens.

The courts that have addressed whether the government can compel registrants to disclose their Internet identifiers are split. By granting this Petition, this Court can clarify to lower courts around the country whether these laws comport with the Constitution. Lower courts need guidance on this issue because it is likely to arise again and again. There are over 725,000 registered sex offenders and over thirty states require registrants to turn over their Internet identifiers.[4] Because the federal government has used its spending power to mandate states collect Internet identifiers from registrants, the issue of whether the government has the authority to collect identifiers must be addressed.

This case is a proper vehicle for the Court to address this emerging split. For example, there is no standing issue because it is undisputed that if Petitioner does not turn over his Internet identifiers when registering, he commits a crime. Moreover, Petitioner tried to register without turning over his Internet identifiers, but was told that if he failed to provide the information, a warrant for his arrest

---

[4] *See* National Center for Missing & Exploited Children, Registered Sex Offenders in the United States per 100,000 Population, available at http://www.missingkids.com/en_US/documents/sex-offender-map.pdf (last visited January 19, 2011).

would likely issue. App. at 58. This case presents a purely legal issue concerning an important question affecting the First Amendment rights of hundreds of thousands of Americans.

CONCLUSION

This Court should grant this petition to address the split among the Tenth Circuit and lower courts concerning the government's ability to compel registrants to disclose their otherwise anonymous Internet identifiers. The Tenth Circuit's holding in this case depended on its conclusions that (1) intermediate scrutiny is the appropriate standard of review, but its analysis incorrectly applied the secondary effects test and ignored the protections afforded anonymous speech and (2) requiring registrants to turn their Internet identifiers over to Utah and the public did not chill speech. Both of these conclusions exceed the bounds of this Court's prior precedent. This Court should review the decision in a writ of certiorari and reverse.

Respectfully submitted,

EMMET J. BONDURANT
(*Counsel of Record*)
NICOLE G. IANNARONE
ELIZABETH G. EAGER
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
404-881-4100

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

MARK SHURTLEFF, Office of the Attorney General for the State of Utah, in his official capacity,

Defendant-Appellee.

No. 09-4162

(Filed Dec. 1, 2010)

ORDER

Before **GORSUCH, McKAY,** and **CUDAHY***, Circuit Judges.

This matter is before the court on Appellant's *Petition For Panel Rehearing And Rehearing En Banc*. Panel rehearing is granted for the limited purpose of correcting the decision filed originally on October 26, 2010. The revised opinion, filed nunc pro

---

* Honorable Richard D. Cudahy, Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

tunc to the original filing date, is attached. The request for panel rehearing is otherwise denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN DOE, Plaintiff-Appellant, v. MARK SHURTLEFF, Office of the Attorney General for the State of Utah, in his official capacity, Defendant-Appellee.	No. 09-4162 (Filed Oct. 26, 2010)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 08-CV-00064-TC)

Elizabeth G. Eager (Emmet J. Bondurant, II, and Nicole G. Iannarone with her on the briefs), of Bondurant, Mixson & Elmore, LLP, Atlanta, GA, for Plaintiff-Appellant.

Nancy L. Kemp, Assistant Utah Attorney General (Sharel S. Reber, Assistant Utah Attorney General, and Mark L. Shurtleff, Utah Attorney General, with her on the brief), Salt Lake City, UT, for Defendant-Appellee.

Before **GORSUCH, McKAY,** and **CUDAHY***, Circuit Judges.

McKAY, Circuit Judge.

In this case John Doe, a registered sex offender living in the state of Utah, appeals the district court's decision to allow enforcement of a Utah statute requiring all sex offenders living in Utah to register

---

* Honorable Richard D. Cudahy, Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

their "internet identifiers" and the corresponding websites with the state. We now uphold that decision based on our conclusion that the statute does not violate the First or Fourth Amendments or the Ex-Post Facto Clause of the United States Constitution, made applicable to Utah through the Fourteenth Amendment.

BACKGROUND

Appellant, proceeding anonymously as Mr. John Doe, was convicted by the United States military court system of sex offenses involving a minor and sentenced to eighteen months' imprisonment. After serving thirteen months of this sentence, Mr. Doe was released without being placed on probation or supervised release. However, as a resident of Utah and a convicted sex offender, Mr. Doe was still required to register with the Utah Department of Corrections, pursuant to Utah Code Ann. § 77-27-21.5 (West 2008). Among its many provisions, this registry law required Mr. Doe to provide all "Internet identifiers[1] and the addresses [he] uses for routing or self-identification in Internet communications or postings." *Id.* § 77-27-21.5(14)(i).[2] The statute also required that Mr. Doe

---

[1] The statute defined "online identifier" as "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication." *Id.* § 77-27-21.5(1)(j).

[2] This provision is now located in subsection (14)(i), pursuant to changes in the statutory structure made shortly after the district court's ruling.

provide "all online identifiers and passwords used to access" websites where he was using an online identifier, with the exception of identifiers used for employment or financial accounts. *Id.* § 77-27-21.5(12)(j) & (29).

Believing that these requirements violated his First and Fourth Amendment rights as well as the Ex Post Facto Clause of the United States Constitution, Mr. Doe refused to provide the requested information and brought a lawsuit challenging the law. Upon Mr. Doe's motion for summary judgment, the district court invalidated the statute based on its conclusion that the statute, which provided "no restrictions on how the [State] c[ould] use or disseminate registrants' internet information," improperly infringed on Mr. Doe's First Amendment right to anonymous speech. (Appellant's App. at 208.) Shortly after this ruling, the Utah legislature amended the statute. First, the legislature removed any requirement that offenders disclose their passwords, and second, it placed some limits on how a state official can use identifiers provided by an offender. Specifically, the statute now[3] provides that

---

[3] In addition to the amendment made shortly after the district court's ruling, the Utah legislature has made several more recent changes to section 77-27-21.5, including changes that went into effect after the parties had filed their briefs. Accordingly, we here cite to Utah's current code, and not to the statute as it existed at the time the parties submitted their arguments.

> The [state], to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders, shall:
>
> (a) develop and operate a system to collect, analyze, maintain, and disseminate information on offenders and sex and kidnap offenses;
>
> (b) make information listed in Subsection (27) available to the public; and
>
> (c) share information provided by an offender under this section that may not be made available to the public under Subsection (27), but only:
>
> (i) for the purposes under this Subsection (2); or
>
> (ii) in accordance with Section 63G-2-206.

Utah Code Ann. § 77-27-21.5(2) (West Supp. 2010). Additionally, the legislature amended Utah's Government Records Access and Management Act, or GRAMA, to designate certain information provided by an offender, including internet identifiers, as private.[4] *See id.* § 63G-2-302(1)(m).

---

[4] Information designated as "private" by GRAMA may only be disclosed in limited circumstances such as when requested by the subject of the record, or pursuant to a court order or legislative subpoena. *See* Utah Code Ann. §§ 63G-2-201(5) (West Supp. 2010); *id.* § 63G-2-202. Additionally, the statute permits information sharing between different government entities and their

(Continued on following page)

Following these amendments, the State filed a motion for the district court to vacate its earlier order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. After considering the briefs, the district court granted the motion, holding that the new restrictions "diminished" the chilling effect on Doe's speech so that his First Amendment right to anonymous speech was no longer "significantly threatened." (Appellant's App. at 292.) The court then concluded that the statute did not violate the Fourth Amendment because Mr. Doe had failed to show he had a reasonable expectation of privacy in his internet identifiers, which are communicated to a third party. Finally, the court held, relying on our earlier decision in *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000), that the registry statute did not violate the Ex Post Facto Clause. Mr. Doe now appeals each of these rulings.

DISCUSSION

We generally review a decision to grant a Rule 60(b) motion for an abuse of discretion. *See Subblefield v. Windsor Capital Grp.*, 74 F.3d 990, 994 (10th Cir. 1996). Nevertheless, we review the district court's decision de novo where, as here, the district court granted relief as a matter of law. *See Lyons v.*

---

agents but places "an entity receiving the record" under "the same restrictions on disclosure of the record as the originating entity." *Id.* § 63G-2-206.

Jefferson Bank & Trust, 994 F.2d 716, 727 (10th Cir. 1993) ("A district court would necessarily abuse its discretion if it based its rulings on an erroneous view of the law. . . .").

1. Mr. Doe's claim under the First Amendment

We first consider Mr. Doe's contention that Utah's registration statute violates his First Amendment right to engage in anonymous speech. In *McIntyre v. Ohio Elections Commission*, the Supreme Court held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." 514 U.S. 334, 342 (1995). As the Supreme Court explained, "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.* at 357 (citation omitted). The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (explaining that the internet allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox" and that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

In spite of these protections, however, a state may permissibly infringe upon this right when its interest is important enough and the law is appropriately tailored to meet the stated interest. *See Am. Constitutional Law Found., Inc. v. Meyer,* 120 F.3d 1092, 1102 (10th Cir. 1997). In evaluating these interests, the Supreme Court has suggested a distinction between the mandatory disclosure in public of a speaker's identity and the requirement that a speaker provide information to the government that could later be used to trace speech back to its source. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Court distinguished between a provision that required petition circulators to wear name badges and a provision that required circulators to file with the state affidavits including their names and addresses. The Court held that the former provision unconstitutionally burdened speech because it compelled identification "at the precise moment when the circulator's interest in anonymity is greatest." *Id.* at 199. In contrast, the affidavit requirement affected anonymity only after the conversations were complete, "exemplif[ying] the type of regulation for which *McIntyre* left room." *Id.* at 200.

According to Mr. Doe, we should view Utah's statute as a content-based restriction, subject to the strictest of scrutiny, because it has the effect of taking "away [Mr.] Doe's right to choose whether to speak anonymously or under a pseudonym." (Appellant's Br. at 10.) We are not persuaded. "The principal inquiry

in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Am. Target Adver., Inc. v. Giani,* 199 F.3d 1241, 1247 (10th Cir. 2000) (internal quotation marks and ellipsis omitted).

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (citation omitted). Thus, in *Giani* we viewed as content neutral a requirement that direct mail solicitors register with the state, reasoning that this requirement targeted the secondary effects of speech – increased fraud and misrepresentation – and was not intended to suppress any particular point of view. 199 F.3d at 1247. As we stated in another case, simply because an otherwise content-neutral law has "an incidental effect on some speakers or messages" does not change its classification so long as it "serves purposes unrelated to the content of expression." *Golan v. Holder,* 609 F.3d 1076, 1083 (10th Cir. 2010).

On its face, section 77-27-21.5 is a content-neutral regulation. The law says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise. Neither is it aimed

at "supress[ing] the expression of unpopular views," *Giani,* 199 F.3d at 1247, but rather it is directed towards aiding the police in solving crimes. As in *Giani,* we therefore examine this law as a content-neutral regulation.

As a content-neutral regulation, Utah's reporting law is subject to intermediate scrutiny, meaning that the law will be upheld if "the Act (1) serves a substantial government interest and (2) is 'narrowly drawn' to serve that interest 'without unnecessarily interfering with First Amendment freedoms.'" *Id.* (quoting *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 637 (1980)). We have no doubt that the State of Utah has a compelling interest in investigating kidnapping and sex-related crimes. Thus, our consideration of this statute focuses on whether it unnecessarily interferes with Mr. Doe's First Amendment freedoms in serving this interest. In reviewing state statutes challenged on First Amendment grounds, we will uphold a law if it is "readily susceptible to a narrowing construction that would make it constitutional." *ACLU v. Johnson,* 194 F.3d 1149, 1159 (10th Cir. 1999). Nevertheless, "[t]he key to application of this principle is that the statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Id.*

Mr. Doe argues that the statute is unconstitutional because the required disclosure of internet identifiers to state officials, as well as the possibility of disclosure of those identifiers to the public, chills

his speech.[5] Turning first to the possibility of disclosure to the public, Mr. Doe focuses on the language of section 77-27-21.5(2)(c), which allows the state to "share information provided by an offender under this section that may not be made available to the public [on the sex-offender notification and registration website], but only: (i) for the purposes under this Subsection (2); *or* (ii) in accordance with Section 63G-2-206." (emphasis added). According to Mr. Doe, the "or" in this statute means that the government may choose to disclose information to the public, free from the privacy safeguards contained in section 63G-2-206, so long as it is "to assist in investigating kidnapping and sex-related crimes." § 77-27-21.5(2). Thus, Mr. Doe argues, the statute allows for the possibility of forced public disclosure of what would otherwise be anonymous speech.

However, although subsection (c)(i) may not contain the explicit privacy safeguards listed in section 63-G-2-206, we are not persuaded that this subsection permits the unrestricted disclosure of information to the general public. Section 21.5 discusses two classes

---

[5] Mr. Doe also alleges that the law is improper because it is not the least restrictive means of addressing the state's interest. However, under intermediate scrutiny "a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broad.*, 512 U.S. at 662 (internal quotation marks and ellipsis omitted).

of information – information that "shall [be made] available to the public," and information that "may not be made available to the public" but may be "shared" for limited law-enforcement purposes or in accordance with section 63-G-2-206. The statutory language thus suggests a distinction between making information available to the public and "sharing" information. Throughout GRAMA and other privacy-related Utah statutes, "share" is used to indicate the limited transfer of information to specified recipients, with the confidentiality of this information otherwise remaining intact. *See, e.g.,* Utah Code Ann. § 63G-2-206(4)(b) (providing for the sharing of records between other governmental entities for specified purposes, with the recipient required to abide by the statutory restrictions on access); *id.* § 26-1-17.5 (permitting sharing of confidential immunization records among certain entities for specified purposes); *id.* § 53-14-101 (authorizing law enforcement agencies to share employee applicant information with other law enforcement agencies, provided that the confidentiality of the information is otherwise maintained); *see also id.* § 63G-2-601(2)-(3) (requiring an information-collecting agency to disclose the specific classes of persons and governmental entities with whom information is shared). Nowhere in the Utah code is "share" used to indicate the unrestricted disclosure of information to the general public.

In light of this broader statutory context, as well as the limited law-enforcement purposes for which internet identifiers may be "shared" under this section,

we conclude that section 77-27-21.5(2)(c)(i) is readily susceptible of a much narrower construction than advanced by Mr. Doe. We thus read this statute as permitting sharing only among law-enforcement agencies, not the public at large, and only for the recited law-enforcement purposes.

As for Mr. Doe's arguments concerning the potential chilling effect of disclosure to state officials, we also hold that the statute includes sufficient restrictions so as not to unnecessarily chill Mr. Doe's speech. Mr. Doe argues that the language of section 77-27-21.5(2) is broad enough to allow the state to monitor his communications at any time, which in turn may chill any anonymous criticisms of oppressive laws or state practices he might otherwise make via the internet. However, while this section, which allows the State to use an offender's internet identifiers "to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders," § 77-27-21.5(2), can be read broadly, we conclude that it is also readily susceptible to a narrowing construction. Accordingly, we read this language, as did the district court, as only allowing state actors to look beyond the anonymity surrounding a username in the course of an investigation after a new crime has been committed.

Although this narrow interpretation may still result in the disclosure of Mr. Doe's online identifiers to state officials, such identification will not unnecessarily interfere with his First Amendment freedom to speak anonymously. First, we note that such a

disclosure would generally occur, if at all, at some time period following Mr. Doe's speech and not at the moment he wished to be heard. As the Fourth Circuit has explained, "Speech is chilled when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression. In other words, the First Amendment protects anonymity where it serves as a catalyst for speech." *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (citation omitted); *see also Buckley*, 525 U.S. at 199-200 (holding that a law requiring petition circulators to attach an affidavit with personal information to completed petitions was constitutional but invalidating a requirement that the circulators wear name badges at the time they gathered petition signatures because it "compelled . . . identification at the precise moment when the circulator's interest in anonymity [was] greatest"). Although there is a possibility that a government agent would have access to Mr. Doe's identity at the time he was speaking – as, for example, if an undercover sought him out in a chat room in the course of investigating a sex crime – we are not persuaded that this possibility imposes a constitutionally improper burden on speech. As the Supreme Court noted in *Laird v. Tatum*:

> [T]his Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of these cases,

> however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain [information-gathering] activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual.

408 U.S. 1, 11 (1972) (citations omitted).

As a final First Amendment consideration, Mr. Doe alleges that Utah's statute is overbroad. Specifically, Mr. Doe argues that the law is unconstitutional because it allows the state to collect the internet identifiers of individuals who are required to register under the reporting statute because of their involvement with a kidnapping offense. According to Mr. Doe, because these offenders' "underlying offenses are not sex-related crimes," the statute is not narrowly drawn to serve the stated purpose of investigating sex-related crimes. (Appellant's Reply Br. at 18.) However, the most recent enactment of the statute allows state officials to access online identifiers "to assist in investigating *kidnapping* and sex-related crimes," § 77-27-21.5(2) (emphasis added), and we are not persuaded that individuals convicted of kidnapping offenses constitute "third parties whose speech is more likely to be protected by the First Amendment than the plaintiff's speech," *D.L.S. v. Utah,* 374 F.3d 971, 976 (10th Cir. 2004); *see also Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466

U.S. 789, 802 (1984) ("[I]f the ordinance may be validly applied to [the plaintiff], it can validly be applied to most if not all . . . parties not before the Court.").

2. Mr. Doe's claims under the Fourth Amendment and Ex Post Facto Clause

We now consider Mr. Doe's claim that he has a reasonable expectation of privacy in his online identifiers and that requiring him to report these identifiers to the state of Utah violates his Fourth Amendment right to be free from unreasonable searches and seizures. We touched on this issue in *United States v. Perrine,* 518 F.3d 1196 (10th Cir. 2008). In *Perrine,* Pennsylvania police officers obtained, without a warrant, subscriber information – including the IP address – associated with the unique Yahoo! online identifier "stevedragonslayer" from Yahoo! (after an individual using that identifier showed pornographic videos of underage girls to another visitor in a Yahoo! chatroom). *Id.* at 1199. Using that IP address, the officers were then able to ascertain the defendant's name and residential address from Cox Communications, the internet service provider that had issued the IP address. *Id.* at 1199-1200. Following his conviction, the defendant challenged the officer's actions based, in part, on his argument that the police had violated his Fourth Amendment rights. We rejected this argument and held that the defendant had no reasonable expectation of privacy in "information that he voluntarily

transmitted to the third-party internet providers, Cox and Yahoo!" *Id.* at 1204.

On appeal, we see no reason why we are not bound by our earlier decision in *Perrine*. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superceding contrary decision by the Supreme Court."). Although Mr. Doe now argues that there is a reasonable expectation of privacy in online identifiers because it is not always the case that an individual can be identified from his identifier, even if police are in possession of the associated IP address, he has raised these arguments for the first time on appeal. "Generally, we do not consider issues not presented to, considered and decided by the trial court, because an appellant's new argument gives rise to a host of new issues, and Appellee had no opportunity to present evidence it may have thought relevant on these issues." *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 828-29 (10th Cir. 2008) (internal quotation marks, brackets, and citation omitted). Such is the case here; Mr. Doe's arguments raise a slew of new issues and evidentiary questions to which the State did not have a fair opportunity to respond.[6]

---

[6] Indeed, as illustrative of the new evidence needed to support Mr. Doe's arguments, he has asked this court to take judicial notice of facts that were not presented in the district court but are, according to Mr. Doe, "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonabl[y] be questioned." (Appellant's Br. at 37 n.70; *see also id.* at 38 n.71.)

However, even if Mr. Doe's arguments were not forfeited, as the district court correctly observed, "there are no facts [in the record] from which the court can conclude that [Mr. Doe's] identities are shielded from [his] Internet service provider." (Appellant's App. at 293.) Accordingly, we find no error in the district court's ruling on Mr. Doe's Fourth Amendment claim.

Finally, we consider Mr. Doe's contention that the district court erred by holding that Utah's statute is not an impermissible ex post facto law. "[T]he threshold inquiry for assessing a violation of the Ex Post Facto Clause in the present case is whether Utah's . . . program constitutes additional criminal punishment for the crimes previously committed by those subject to its provisions." *Femedeer v. Haun,* 227 F.3d 1244, 1248 (10th Cir. 2000). Thus, "[i]f the notification measures are deemed civil rather than criminal in nature, they present no ex post facto violation." *Id.* Even where, as here, neither party contests that the legislature intended to establish a civil remedy, we must still consider whether "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson v. United States,* 522 U.S. 93, 99 (1997) (internal quotation marks, brackets, and citation omitted). However, "[o]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 100 (internal quotation marks omitted).

In *Femedeer v. Haun*, after examining the same Utah statute at issue in this case – absent the requirement that an offender disclose his or her internet identifiers – we stated that the evidence did "not come even close to the 'clearest proof' necessary to overcome the civil intent of Utah's legislature." 227 F.3d at 1253. We then held that "Utah's notification scheme imposes only a civil burden upon sex offenders and therefore does not run afoul of the Ex Post Facto Clause." *Id.* Nevertheless, on appeal Mr. Doe argues that this new disclosure requirement provides "'the clearest proof' that the notification scheme is an ex post facto law that is punitive in purpose and effect." (Appellant's Br. at 45.) Looking closely at Mr. Doe's argument on this issue, it seems clear that his contentions depend entirely upon his argument that the Utah statute would allow impermissible public disclosure of his internet identifiers, thereby destroying his right to anonymous speech. However, because we conclude that Utah's registration statute does not violate the First Amendment, we hold that the effect of the new disclosure requirements is not substantial enough to alter our original analysis of the statute in *Femedeer*. Thus, we hold that the district court did not err in dismissing Mr. Doe's claim under the Ex Post Facto Clause.

Therefore, for these and the foregoing reasons, we **AFFIRM** the district court's ruling vacating its earlier orders enjoining enforcement of the statute.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

MARK SHURTLEFF, Office of the Attorney General for the State of Utah, in his official capacity,

Defendant-Appellee.

No. 09-4162

(Filed Oct. 26, 2010)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 08-CV-00064-TC)

Elizabeth G. Eager (Emmet J. Bondurant, II, and Nicole G. Iannarone with her on the briefs), of Bondurant, Mixson & Elmore, LLP, Atlanta, GA, for Plaintiff-Appellant.

Nancy L. Kemp, Assistant Utah Attorney General (Sharel S. Reber, Assistant Utah Attorney General, and Mark L. Shurtleff, Utah Attorney General, with her on the brief), Salt Lake City, UT, for Defendant-Appellee.

Before **GORSUCH, McKAY,** and **CUDAHY***, Circuit Judges.

McKAY, Circuit Judge.

In this case John Doe, a registered sex offender living in the state of Utah, appeals the district court's decision to allow enforcement of a Utah statute requiring all sex offenders living in Utah to register their "internet identifiers" and the corresponding websites with the state. We now uphold that decision based on our conclusion that the statute does not violate the First or Fourth Amendments or the Ex-Post Facto Clause of the United States Constitution, made applicable to Utah through the Fourteenth Amendment.

BACKGROUND

Appellant, proceeding anonymously as Mr. John Doe, was convicted by the United States military court system of sex offenses involving a minor and sentenced to eighteen months' imprisonment. After serving thirteen months of this sentence, Mr. Doe was released without being placed on probation or supervised release. However, as a resident of Utah

---

* Honorable Richard D. Cudahy, Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

and a convicted sex offender, Mr. Doe was still required to register with the Utah Department of Corrections, pursuant to Utah Code Ann. § 77-27-21.5 (West 2008). Among its many provisions, this registry law required Mr. Doe to provide all "Internet identifiers[1] and the addresses [he] uses for routing or self-identification in Internet communications or postings." *Id.* § 77-27-21.5(14)(i).[2] The statute also required that Mr. Doe provide "all online identifiers and passwords used to access" websites where he was using an online identifier, with the exception of identifiers used for employment or financial accounts. *Id.* § 77-27-21.5(12)(j) & (29).

Believing that these requirements violated his First and Fourth Amendment rights as well as the Ex Post Facto Clause of the United States Constitution, Mr. Doe refused to provide the requested information and brought a lawsuit challenging the law. Upon Mr. Doe's motion for summary judgment, the district court invalidated the statute based on its conclusion that the statute, which provided "no restrictions on how the [State] c[ould] use or disseminate registrants' internet information," improperly infringed on Mr. Doe's First Amendment right to anonymous speech.

---

[1] The statute defined "online identifier" as "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication." *Id.* § 77-27-21.5(1)(j).

[2] This provision is now located in subsection (14)(i), pursuant to changes in the statutory structure made shortly after the district court's ruling.

(Appellant's App. at 208.) Shortly after this ruling, the Utah legislature amended the statute. First, the legislature removed any requirement that offenders disclose their passwords, and second, it placed some limits on how a state official can use identifiers provided by an offender. Specifically, the statute now[3] provides that

> The [state], to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders, shall:
>
> (a) develop and operate a system to collect, analyze, maintain, and disseminate information on offenders and sex and kidnap offenses;
>
> (b) make information listed in Subsection (27) available to the public; and
>
> (c) share information provided by an offender under this section that may not be made available to the public under Subsection (27), but only:
>
> (i) for the purposes under this Subsection (2); or

---

[3] In addition to the amendment made shortly after the district court's ruling, the Utah legislature has made several more recent changes to section 77-27-21.5, including changes that went into effect after the parties had filed their briefs. Accordingly, we here cite to Utah's current code, and not to the statute as it existed at the time the parties submitted their arguments.

> (ii) in accordance with [the Government Records Access and Management Act].

Utah Code Ann. § 77-27-21.5(2) (West Supp. 2010). Additionally, the legislature amended Utah's Government Records Access and Management Act, or GRAMA, to designate certain information provided by an offender, including internet identifiers, as private.[4] *See* Utah Code Ann. § 63G-2-302(1)(m) (West Supp. 2010).

Following these amendments, the State filed a motion for the district court to vacate its earlier order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. After considering the briefs, the district court granted the motion, holding that the new restrictions "diminished" the chilling effect on Doe's speech so that his First Amendment right to anonymous speech was no longer "significantly threatened." (Appellant's App. at 292.) The court then concluded that the statute did not violate the Fourth Amendment because Mr. Doe had failed to show he had a reasonable expectation of privacy in his internet

---

[4] Information designated as "private" by GRAMA may only be disclosed in limited circumstances such as when requested by the subject of the record, or pursuant to a court order or legislative subpoena. *See* Utah Code Ann. §§ 63G-2-201(5) (West Supp. 2010); *id.* § 63G-2-202. Additionally, the statute permits information sharing between different government entities and their agents but places "an entity receiving the record" under "the same restrictions on disclosure of the record as the originating entity." *Id.* § 63G-2-206.

identifiers, which are communicated to a third party. Finally, the court held, relying on our earlier decision in *Femedeer v. Haun,* 227 F.3d 1244, 1246 (10th Cir. 2000), that the registry statute did not violate the Ex Post Facto Clause. Mr. Doe now appeals each of these rulings.

DISCUSSION

We generally review a decision to grant a Rule 60(b) motion for an abuse of discretion. *See Subblefield v. Windsor Capital Grp.,* 74 F.3d 990, 994 (10th Cir. 1996). Nevertheless, we review the district court's decision de novo where, as here, the district court granted relief as a matter of law. *See Lyons v. Jefferson Bank & Trust,* 994 F.2d 716, 727 (10th Cir. 1993) ("A district court would necessarily abuse its discretion if it based its rulings on an erroneous view of the law. . . .").

1. Mr. Doe's claim under the First Amendment

We first consider Mr. Doe's contention that Utah's registration statute violates his First Amendment right to engage in anonymous speech. That the First Amendment guarantees a right to anonymous speech is beyond question. As the Supreme Court explained in *McIntyre v. Ohio Elections Commission,* "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their

ideas from suppression – at the hand of an intolerant society." 514 U.S. 334, 357 (1995) (citation omitted). The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet. *See Reno v. ACLU,* 521 U.S. 844, 870 (1997) (explaining that the internet allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox" and that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). In spite of these protections, however, a state may permissibly infringe upon this right when its interest is important enough and the law is appropriately tailored to meet the stated interest. *See Am. Constitutional Law Found., Inc. v. Meyer,* 120 F.3d 1092, 1102 (10th Cir. 1997).

According to Mr. Doe, we should view Utah's statute as a content-based restriction, subject to the strictest of scrutiny, because it has the effect of taking "away [Mr.] Doe's right to choose whether to speak anonymously or under a pseudonym." (Appellant's Br. at 10.) We are not persuaded. "The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Am. Target Adver., Inc. v. Giani,* 199 F.3d 1241, 1247 (10th Cir. 2000) (internal quotation marks and ellipsis omitted).

> As a general rule, laws that by their terms distinguish favored speech from

> disfavored speech on the basis of ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (citation omitted). Simply because an otherwise content-neutral law has "an incidental effect on some speakers or messages" does not change its classification so long as it "serves purposes unrelated to the content of expression." *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010). On its face, section 77-27-21.5 is a content-neutral regulation. The law says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise. Neither is it aimed at "supress[ing] the expression of unpopular views," *Am. Target*, 199 F.3d at 1247, but rather it is directed towards aiding the police in solving crimes. We will therefore examine the State's law as a content-neutral regulation.

As a content-neutral regulation, Utah's reporting law is subject to intermediate scrutiny, meaning that the law will be upheld if "the Act (1) serves a substantial government interest and (2) is 'narrowly drawn' to serve that interest 'without unnecessarily interfering with First Amendment freedoms.'" *Id.* (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)). Both sides have agreed that Utah has a compelling interest in protecting the public from kidnapping and sex-related crimes, and

we conclude that the reporting statute serves that interest. Thus, our consideration of this statute must focus on whether it unnecessarily interferes with Mr. Doe's First Amendment freedoms. In reviewing state statutes challenged on First Amendment grounds, we will uphold a law if it is "readily susceptible to a narrowing construction that would make it constitutional." *ACLU v. Johnson,* 194 F.3d 1149, 1159 (10th Cir. 1999). Nevertheless, "[t]he key to application of this principle is that the statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Id.*

Mr. Doe argues that the statute is unconstitutional because the required disclosure of internet identifiers to state officials, as well as the possibility of disclosure of those identifiers to the public, chills his speech.[5] Turning first to the possibility of disclosure to the public, Mr. Doe focuses on the language of section 77-27-21.5(2)(c), which allows the state to "share information provided by an offender under this section that may not be made available to the public

---

[5] Mr. Doe also alleges that the law is improper because it is not the least restrictive means of addressing the state's interest. However, under intermediate scrutiny "a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broad.,* 512 U.S. at 662 (internal quotation marks and ellipsis omitted).

[on the sex-offender notification and registration website], but only: (i) for the purposes under this Subsection (2); **or** (ii) in accordance with Section 63G-2-206." (emphasis added). According to Mr. Doe, the "or" in this statute means that the government may choose to disclose information to the public, free from the privacy safeguards contained in section 63G-2-206, so long as it is "to assist in investigating kidnapping and sex-related crimes." § 77-27-21.5(2). Thus, Mr. Doe argues, the statute allows for the possibility of forced public disclosure of what would otherwise be anonymous speech.

Despite Mr. Doe's arguments, however, we conclude that Utah's law provides sufficient safeguards so as to negate any potential fears of public disclosure. While Mr. Doe is correct that the language of subsections (c)(i) and (c)(ii) allows law enforcement to share information under either condition, he is not correct that information shared under subsection 21.5(c)(i) loses its privacy protection. Rather, as we discussed *infra*, under Utah's GRAMA statute, Mr. Doe's online identifiers are classified as private records and may not be disclosed except under the limited circumstances allowed by sections 63-G-2-202, 63G-2-206, or 63G-2-303. *See* Utah Code Ann. § 63G-2-201(5)(a) (West Supp. 2010). Thus, even if information shared under section 77-27-21.5(2)(c)(i) is not subject to the protections of section 63G-2-206, it is nevertheless protected by and subject to the disclosure and privacy requirements of section 63G-2-201(5) and its related provisions, which include

criminal penalties accompanying an unauthorized disclosure. *See id.* § 63G-2-801(1)(a).

As for Mr. Doe's arguments concerning the potential chilling effect of disclosure to state officials, we also hold that the statute includes sufficient restrictions so as not to unnecessarily chill Mr. Doe's speech. Mr. Doe argues that the language of section 77-27-21.5(2) is broad enough to allow the state to monitor his communications at any time, which in turn may chill any anonymous criticisms of oppressive laws or state practices he might otherwise make via the internet. However, while this section, which allows the State to use an offender's internet identifiers "to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders," § 77-27-21.5(2), can be read broadly, we conclude that it is also readily susceptible to a narrowing construction. Accordingly, we read this language, as did the district court, as only allowing state actors to look beyond the anonymity surrounding a username in the course of an investigation after a new crime has been committed.

Although this narrow interpretation may still result in the disclosure of Mr. Doe's online identifiers to state officials, such identification will not unnecessarily interfere with his First Amendment freedom to speak anonymously because such a disclosure would occur, if at all, at some time period following Mr. Doe's speech and not at the moment he wished to be heard. As the Fourth Circuit has explained, "Speech is chilled when an individual whose speech relies on

anonymity is forced to reveal his identity as a precondition to expression. In other words, the First Amendment protects anonymity where it serves as a catalyst for speech." *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (citation omitted); *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999) (holding that a law requiring petition circulators to attach an affidavit with personal information to completed petitions was constitutional but invalidating a requirement that the circulators wear name badges at the time they gathered petition signatures because it "compelled . . . identification at the precise moment when the circulator's interest in anonymity [was] greatest").

As a final First Amendment consideration, Mr. Doe alleges that Utah's statute is overbroad. Specifically, Mr. Doe argues that the law is unconstitutional because it allows the state to collect the internet identifiers of individuals who are required to register under the reporting statute because of their involvement with a kidnapping offense. According to Mr. Doe, because these offenders' "underlying offenses are not sex-related crimes," the statute is not narrowly drawn to serve the stated purpose of investigating sex-related crimes. (Appellant's Reply Br. at 18.) However, the most recent enactment of the statute allows state officials to access online identifiers "to assist in investigating *kidnapping* and sex-related crimes," § 77-27-21.5(2) (emphasis added), and we are not persuaded that individuals convicted of

kidnapping offenses constitute "third parties whose speech is more likely to be protected by the First Amendment than the plaintiff's speech," *D.L.S. v. Utah,* 374 F.3d 971, 976 (10th Cir. 2004); *see also Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 802 (1984) ("[I]f the ordinance may be validly applied to [the plaintiff], it can validly be applied to most if not all . . . parties not before the Court.").

2. Mr. Doe's claims under the Fourth Amendment and Ex Post Facto Clause

We now consider Mr. Doe's claim that he has a reasonable expectation of privacy in his online identifiers and that requiring him to report these identifiers to the state of Utah violates his Fourth Amendment right to be free from unreasonable searches and seizures. We touched on this issue in *United States v. Perrine,* 518 F.3d 1196 (10th Cir. 2008). In *Perrine,* Pennsylvania police officers obtained, without a warrant, subscriber information – including the IP address – associated with the unique Yahoo! online identifier "stevedragonslayer" from Yahoo! (after an individual using that identifier showed pornographic videos of underage girls to another visitor in a Yahoo! chatroom). *Id.* at 1199. Using that IP address, the officers were then able to ascertain the defendant's name and residential address from Cox Communications, the internet service provider that had issued the IP address. *Id.* at 1199-1200. Following his conviction, the defendant

challenged the officer's actions based, in part, on his argument that the police had violated his Fourth Amendment rights. We rejected this argument and held that the defendant had no reasonable expectation of privacy in "information that he voluntarily transmitted to the third-party internet providers, Cox and Yahoo!" *Id.* at 1204.

On appeal, we see no reason why we are not bound by our earlier decision in *Perrine. See In re Smith,* 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superceding contrary decision by the Supreme Court."). Although Mr. Doe now argues that there is a reasonable expectation of privacy in online identifiers because it is not always the case that an individual can be identified from his identifier, even if police are in possession of the associated IP address, he has raised these arguments for the first time on appeal. "Generally, we do not consider issues not presented to, considered and decided by the trial court, because an appellant's new argument gives rise to a host of new issues, and Appellee had no opportunity to present evidence it may have thought relevant on these issues." *Utah Envtl. Cong. v. Russell,* 518 F.3d 817, 828-29 (10th Cir. 2008) (internal quotation marks, brackets, and citation omitted). Such is the case here; Mr. Doe's arguments raise a slew of new issues and evidentiary questions to which the

State did not have a fair opportunity to respond.[6] However, even if Mr. Doe's arguments were not forfeited, as the district court correctly observed, "there are no facts [in the record] from which the court can conclude that [Mr. Doe's] identities are shielded from [his] Internet service provider." (Appellant's App. at 293.) Accordingly, we find no error in the district court's ruling on Mr. Doe's Fourth Amendment claim.

Finally, we consider Mr. Doe's contention that the district court erred by holding that Utah's statute is not an impermissible ex post facto law. "[T]he threshold inquiry for assessing a violation of the Ex Post Facto Clause in the present case is whether Utah's . . . program constitutes additional criminal punishment for the crimes previously committed by those subject to its provisions." *Femedeer v. Haun,* 227 F.3d 1244, 1248 (10th Cir. 2000). Thus, "[i]f the notification measures are deemed civil rather than criminal in nature, they present no ex post facto violation." *Id.* Even where, as here, neither party contests that the legislature intended to establish a civil remedy, we must still consider whether "the statutory scheme was so punitive either in purpose or effect as to

---

[6] Indeed, as illustrative of the new evidence needed to support Mr. Doe's arguments, he has asked this court to take judicial notice of facts that were not presented in the district court but are, according to Mr. Doe, "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonabl[y] be questioned." (Appellant's Br. at 37 n.70; *see also id.* at 38 n.71.)

transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (internal quotation marks, brackets, and citation omitted). However, "[o]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 100 (internal quotation marks omitted).

In *Femedeer v. Haun*, after examining the same Utah statute at issue in this case – absent the requirement that an offender disclose his or her internet identifiers – we stated that the evidence did "not come even close to the 'clearest proof' necessary to overcome the civil intent of Utah's legislature." 227 F.3d at 1253. We then held that "Utah's notification scheme imposes only a civil burden upon sex offenders and therefore does not run afoul of the Ex Post Facto Clause." *Id.* Nevertheless, on appeal Mr. Doe argues that this new disclosure requirement provides "'the clearest proof' that the notification scheme is an ex post facto law that is punitive in purpose and effect." (Appellant's Br. at 45.) Looking closely at Mr. Doe's argument on this issue, it seems clear that his contentions depend entirely upon his argument that the Utah statute would allow impermissible public disclosure of his internet identifiers, thereby destroying his right to anonymous speech. However, because we conclude that Utah's registration statute does not violate the First Amendment, we hold that the effect of the new disclosure requirements is not substantial enough to alter our original

analysis of the statute in *Femedeer*. Thus, we hold that the district court did not err in dismissing Mr. Doe's claim under the Ex Post Facto Clause.

Therefore, for these and the foregoing reasons, we **AFFIRM** the district court's ruling vacating its earlier orders enjoining enforcement of the statute.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

JOHN DOE, Plaintiff, vs. MARK SHURTLEFF, et al., Defendants.	ORDER AND MEMORANDUM DECISION Case No. 1:08-CV-64-TC

Defendants have filed a motion under Federal Rule of Civil Procedure 60(b) asking this court to vacate its earlier order enjoining enforcement of sections of Utah's sex offender registry statute. Defendants' motion is based on recent amendments to the statute by the Utah Legislature. Because the amendments made by the Legislature address the statute's Constitutional violations, the court vacates its enjoinment of the statute.

BACKGROUND

This case is a challenge to portions of Utah's sex offender registry statute (the "Registry Statute"), Utah Code Ann. § 77-27-21.5. The Plaintiff, Mr. Doe, was convicted of sexual offenses in the United States military court system in 2005. He served his sentence and was released without being placed on parole or supervised release.

Utah's Registry Statute requires sex offenders, such as Mr. Doe, to register with the Utah Department of Corrections (UDOC). Effective July 1, 2008, the Registry Statute required registrants to provide the following information to the UDOC:

> (i) Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings; [and]
>
> (j) the name and Internet address of all websites on which the sex offender is registered using an online identifier, including all online identifiers and passwords used to access those websites . . .

Utah Code Ann. § 77-27-21.5(14)(i) & (j) (2008). "Internet identifier" is defined as "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication" and does not include "date of birth, Social Security number, or PIN number." *Id.* § 77-27-21.5(1)(j) (2009). The Registry Statute also mandated that UDOC "require that a sex offender provide to the department any password required for use with an online identifier. Passwords provided to the department may not be disclosed to the public." *Id.* § 77-27-21.5(2)(c) (2008).

Mr. Doe filed this suit challenging the Registry Statute. He alleged that the Registry Statute's required disclosure of his Internet identifiers, related websites, and passwords violates the United States Constitution. In particular, he argued that the requirement

violated his First Amendment right to free speech, his Fourth Amendment right to be free of unreasonable searches, and the *ex post facto* clause.

On September 25, 2008, this court issued an order enjoining enforcement of the Registry Statute against Mr. Doe. The court concluded that the statute violated Mr. Doe's First Amendment right to anonymous online speech because, although the statute promoted a compelling state interest, its requirements were not the least restrictive means available. (Docket No. 36.) The court noted that the Registry Statute contained no restrictions on how the UDOC could use or disseminate registrants' Internet information, implicating protected speech and criminal activity alike. Because the statute violated the First Amendment, the court did not reach Mr. Doe's *ex post facto* or Fourth Amendment arguments. In addition, the court granted a stipulated motion of the parties requesting that the court temporarily enjoin the defendants from enforcing the password requirements of the Registry Statute against Mr. Doe, until July 1, 2009. (Docket No. 29.)

On May 12, 2009, amendments to the Registry Statute enacted by the Utah Legislature became effective. The legislature amended both the Registry Statute and the Governmental Records Access and Management Act (GRAMA), Utah Code Ann. § 63G-2-302, which governs privacy of records.

The amendments accomplished two things. First, they removed all requirements for disclosure of

passwords and explicitly excluded passwords from the definition of "Internet identifier." Utah Code Ann. § 77-27-21.5(1)(j) (2009). Second, they limited UDOC's discretion in its use of offenders' internet identifiers. Now UDOC may only use the identifiers to investigate sex-related crimes or to make disclosures permitted by GRAMA. Language added to the Registry Statute provides,

> The department, to assist in investigating sex-related crimes and in apprehending offenders, shall: . . . share information provided by an offender under this section that may not be made available to the public under Subsection (27), but only:
>
> > (i) for the purposes under this Subsection (2); or
> >
> > (ii) in accordance with [GRAMA] Section 63G-2-206.

Utah Code Ann. § 77-27-21.5(2)(c). Subsection (2) provides that to assist in investigating sex-related crimes, UDOC shall "develop and operate a system to collect, analyze, maintain, and disseminate information on offenders and sex and kidnap offenses." *Id.* § 77-27-21.5(2)(a). Subsection (27) lists the information that must be included on the sex offender notification and registration website. *Id.* § 77-27-21.5(27). The list does not include Internet identifiers.

GRAMA was amended to designate as "private" any information provided by an offender in compliance with the Registry Statute (with the exception of

information the Registry Statute requires be made public). *Id.* § 63G-2-302(1)(m) (2009). Under GRAMA, private records may only be disclosed in certain limited situations including when requested by the subject of the record, those authorized by the subject to receive the information, or when the information is subject to a court order or legislative subpoena. *Id.* § 63G-2-202. GRAMA also controls record sharing between governmental entities and requires a receiving entity comply with the same restrictions on disclosures as the originating entity. *Id.* § 63G-2-206.

After the passage of these amendments, the Defendants filed a motion under Federal Rule of Civil Procedure 60(b), requesting that the court vacate its prior orders as moot.

ANALYSIS

The Defendants argue that amendments passed by the Utah Legislature moot this challenge and the case should be dismissed. Mr. Doe maintains the changes are not so great as to render the challenge moot and he reasserts his challenges under the First Amendment, Fourth Amendment and *ex post facto* clause.

I. Mootness

The Defendants argue that the amendments to the Registry Statute render both orders issued in this case moot. Article III of the United States

Constitution limits federal court jurisdiction to actual cases or controversies. U.S. Const. art. III, § 2, cl. 1. An actual case or controversy must be present at all stages of the litigation, not only at the inception of the suit. *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1245 (10th Cir. 2009). The critical inquiry in deciding whether a case is moot is "whether granting a present determination of the issues offered will have some effect in the real world." *Id.* at 1246.

"Generally, repeal of a challenged statute causes a case to become moot because it extinguishes the plaintiff's legally cognizable interest in the outcome, rendering any remedial action by the court ineffectual." *Id.* But, "[w]here a new statute is sufficiently similar to the repealed statute that it is permissible to say that the challenged conduct continues, the controversy is not mooted by the change, and a federal court continues to have jurisdiction." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (quotation and alteration omitted). To determine whether the amendments moot this challenge, this court must compare the versions of the statute to determine whether the changes are "too numerous and too fundamental to preserve . . . jurisdiction." *Id.*

The requirement that offenders provide their Internet passwords to the UDOC was stricken from the Registry Statute by the amendments. Accordingly, there is no case or controversy concerning this provision and the challenge is moot. The court's order

staying the enforcement of this provision is likewise moot.

In contrast, the requirements concerning disclosure of Internet identifiers remain in place. While the amendments made meaningful changes to the restrictions on UDOC's use of the information, Mr. Doe's challenge went beyond these concerns. In particular, he argues that the Registry Statute violates the Fourth Amendment and *ex post facto* clause of the Constitution. These challenges are unaffected by the amendments and are not moot.

In addition, although Mr. Doe's First Amendment challenge included arguments based on the lack of controls on the information, he also argued that the required disclosure itself violated his First Amendment rights. The changes to the Registry Statute, while giving the court good cause to reconsider its earlier order, are not so numerous and fundamental as to render Mr. Doe's First Amendment challenge moot. *See Citizens for Responsible Gov't*, 236 F.3d at 1182. In particular, in considering "whether granting a present determination of the issues offered will have some effect in the real world," it is clear that the relief requested by Mr. Doe (enjoining the enforcement of the Registry Statute provisions requiring him to disclose his Internet identifiers) will have a real effect.

II. First Amendment Challenge

The court applied exacting scrutiny to the 2008 Registry Statute. (Docket No. 36 at 13.) Under exacting scrutiny, "the government may 'regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.'" *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999) (quoting *Sable Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989)). In the court's previous order, the court found that the Registry Statute achieves the compelling interest in protecting children from Internet predators and investigating online crimes, but concluded it was not the least restrictive means available because it did not restrict the use of the information to the investigation of sex-related crimes. (Docket No. 36 at 14.)

"When a law burdens core political speech, [courts] apply 'exacting scrutiny,' and . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) ("Laws that restrict core political speech . . . are subject to 'exacting scrutiny.'"). The 2008 Registry Statute would have permitted monitoring of any speech, including core political speech. *See Initiative & Referendum Inst.*, 450 F.3d at 1099 (defining "core political speech" as "interactive communication concerning political change"). The intrusion into Mr. Doe's ability to engage in anonymous core political

speech lead the court to apply exacting scrutiny.[1] *See McIntyre*, 514 U.S. at 347.

"The First Amendment affords the broadest protection to such political expression in order to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 346 (quotations and citations omitted). Not all speech is entitled to such strong protections. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position. . . ."). Courts have broadly agreed that the protection afforded to anonymous Internet users must be related to the importance of the type of speech. *See, e.g.*, *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008) ("However, the right to speak anonymously, on the Internet or otherwise, is not absolute and does not protect speech that otherwise would be unprotected."); *Freedman v. Am. Online, Inc.*, 412 F. Supp. 2d 174, 184 (D. Conn. 2005) ("Although anonymous speech is entitled to First Amendment protection, threatening communications are not."); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562-63 (S.D.N.Y. 2004) ("Anonymous speech, like speech from identifiable sources, does not have absolute

---

[1] *See* Docket No. 36 at 7-12.

protection. The First Amendment, for example, does not protect copyright infringement.").

Because the Registry Statute no longer burdens core political speech, it does not infringe upon that "highest, most protected position." *R.A.V.*, 505 U.S. at 422 (Stevens, J., concurring). Consequently, the court need not apply exacting scrutiny in examining the statute. As the Fourth Circuit has explained:

> The First Amendment protects anonymous speech in order to prevent the government from suppressing expression through compelled public identification. Forced public revelation discourages proponents of controversial viewpoints from speaking by exposing them to harassment or retaliation for the content of their speech. Speech is chilled when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression. In other words, *the First Amendment protects anonymity where it serves as a catalyst for speech.*

Peterson v. Nat'l Telecomm. & Info. Admin., 478 F.3d 626, 632 (4th Cir. 2007) (citations omitted and emphasis added).

Following the 2009 amendments, the anonymity of those registered under the Registry Statute can only be lifted to investigate an Internet sex crime. Because of the restrictions on the use of the information, the chilling effect on speech is necessarily diminished. It is no longer the case that the anonymity that Mr. Doe relies on as a catalyst for his protected online

speech is significantly threatened by the Registry Statute. Accordingly, the Registry Statute now complies with the requirements of the First Amendment. *See id.* ("Because anonymity did not serve as a catalyst for Appellant's expression, the [Appellee's] disclosure requirement was no threat to his speech activities and did not cause him injury.").

III. Fourth Amendment

Mr. Doe also argues that the Registry Statute's requirement that he divulge his Internet information violates his Fourth Amendment right to be free from unreasonable searches and seizures. To establish a violation of the Fourth Amendment, a plaintiff must show that he has a reasonable expectation of privacy in the information to be divulged. *U.S. v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002). An individual has no reasonable expectation of privacy in subscriber information provided to an Internet provider. *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008). In *Perrine*, for example, when law enforcement obtained records from Yahoo! linking a screen name to an IP address registered to the defendant, the Tenth Circuit held that the Fourth Amendment was not implicated because the defendant had no expectation of privacy in information he had voluntarily transmitted to a third-party Internet provider. *Id.* at 1199, 1204.

Presumably, Mr. Doe accesses the Internet through an IP address that is linked to his subscriber

information, which would include his identity. He would have no reasonable expectation of privacy in those user names. The party asserting the protection of the Fourth Amendment bears the burden of demonstrating that he has a reasonable expectation of privacy in the area to be searched. *Angevine*, 281 F.3d at 1134. Although Mr. Doe alleges that he carefully guards his online identity, there are no facts here from which the court can conclude that those identities are shielded from Mr. Doe's Internet service provider and, accordingly, Mr. Doe has not met his burden.

IV. Ex Post Facto

Finally, Mr. Doe argues that the Registry Statute violates the *ex post facto* clause of the Constitution. For a criminal law to be *ex post facto* it "must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnote and quotation omitted). In determining whether a sex offender registry statute is *ex post facto*, the court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the intent of the legislature in passing the statute was punitive, the statute is *ex post facto*. But, if the intent was a nonpunitive and civil regulatory scheme, the statute is only *ex post facto* if it "is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (quotation and alteration omitted). The court's review

of the legislature's intent is deferential and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quotation omitted).

Prior to the enactment of any Internet identifier disclosure requirements, Utah's Registry Statute was challenged under the *ex post facto* clause. *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000). The Tenth Circuit held that the Utah legislature intended to establish a civil remedy when it passed the Registry Statute. *Id.* at 1249.

In reaching its holding, the court applied the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which are:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Femedeer, 227 F.3d at 1249 (quotations omitted).

The analysis in *Femedeer* still applies to the Registry Statute. In *Femedeer*, the Tenth Circuit concluded that because the Registry statute did "not by itself prohibit sex offenders from pursuing any vocation or avocation available to other members of the public," it did not constitute an affirmative disability or restraint. 227 F.3d at 1250. Likewise, the new provisions at issue here do not create an affirmative disability. Nor can the requirement to notify law enforcement of Internet identifiers historically regarded as punishment. This type of requirement is similar to the maintenance of any public record and not an activity that is punitive in purpose of effect. *See id.* As for the third factor, the *Femedeer* court examined the Registry Statute and determined that the notification requirements do not come into play only on a finding of scienter. *Id.* at 1251-52. The changes to the Registry Statute concerning Internet identifiers did not affect when the statute is triggered. Accordingly, this factor remains unaltered.

The *Femedeer* court found that the fourth factor, that is whether the provision promotes traditional aims of punishment, cut both ways. *Id.* at 1252. The court held that the Registry Statute may deter individuals from committing sex crimes. *Id.* But a statute that serves the criminal goal of deterrence may also serve civil goals, such as investigation of crimes. *See id.* The additional requirement of divulging Internet identifiers may increase the deterrence effect, but it also provides an additional investigative tool. Accordingly, this factor remains neutral.

"Where behavior triggering the sanction is itself a crime, we are more likely to infer that the sanction is itself criminal in nature." *Id.* This fifth factor, as in *Femedeer*, seems to point toward a finding that the Registry Statute is criminal. But, also as in *Femedeer*, because "Utah has sought to use the sex offender registry to aid in the civil purpose of prevention and investigation of future sex crimes . . . [the court] accord[s] only limited weight to this factor in light of the equally strong connection between notification and legitimate civil purposes." *Id.* at 1252-53.

The sixth factor requires the court to consider "whether the 'good purpose' is rationally connected to the consequences." *Id.* at 1253. Here, the question is whether "the legitimate civil goals of deterrence, avoidance, and investigation are rationally connected" to the Registry Statute's requirement of divulging Internet identifiers. *Id.* The state must only show a rational connection. Here, there is a rational relationship between the disclosure of Internet identifiers, which may be used to investigate sex crimes and deter offenders from using the Internet to commit such crimes, and the Registry Statute's stated purpose to "assist in the investigation of sex-related crimes and in apprehending offenders." Utah Code Ann. § 77-27-21.5(2).

Finally, the court must consider whether "the sanction appears excessive in relation to the alternative purpose assigned." *Femedeer*, 227 F.3d at 1253. The *Femedeer* court concluded, "[i]n the present case, the 'alternative purpose assigned' is to aid in the

prevention, avoidance, and investigation of future sex offenses. In light of the substantial interests at stake, we do not think that Internet notification imposes excessive costs." *Id.* Although requiring disclosure of the Internet identifiers places an additional burden on offenders, it is not so great as to make the Registry Statute excessive.

Accordingly, as in *Femedeer*, only the fifth factor suggests that the Registry Statute constitutes criminal punishment. Based on this analysis, Mr. Doe has not shown the "clearest proof" of punitive intent necessary to overcome the Utah legislature's stated civil intent. *See Smith*, 538 U.S. at 92. The Internet identifier requirements of the Registry Statute do not violate the *ex post facto* clause of the Constitution.

ORDER

For the foregoing reasons, the Defendants' motion to vacate the orders enjoining enforcement of the statute (Docket No. 50) is GRANTED.

DATED this 20th day of August, 2009.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

JOHN DOE, Plaintiff, vs. MARK SHURTLEFF, Office of the Attorney General for the State of Utah, in his Official Capacity, et al., Defendants.	ORDER and MEMORANDUM DECISION (Filed Sep. 25, 2008) Case No. 1:08-CV-64 TC

This case involves a constitutional challenge to a Utah state statute that has recently taken effect. The relevant part of that statute requires sex offenders in Utah to provide Utah's sex offender registry with all of their internet identifiers and the websites on which they use those identifiers. This action was brought by a Utah resident convicted of sex offenses in a United States military court who has sued under the fictitious name of John Doe. Mr. Doe has completed his sentence for his sex-related crimes and is not on parole or subject to supervised release. Mr. Doe contends that his right to protected anonymous speech on the internet is diminished by the disclosure requirements of Utah's statute. He challenges the statute as unconstitutional on its face as applied to him and is seeking summary judgment.

The court agrees with Mr. Doe. Although Mr. Doe is a sex offender, he has not forfeited his First Amendment rights, including his right to anonymous online speech. To justify a restriction of those rights, Utah needs to show that it has a compelling interest and has chosen the least restrictive means to achieve that interest. While Utah undeniably has a strong interest in protecting children from internet predators and investigating crime, the statute's disclosure requirements are not crafted in a way to meet those goals while also protecting Mr. Doe's rights. Accordingly, the court GRANTS Mr. Doe's motion for summary judgment.

BACKGROUND

The court finds the following facts to be undisputed for purposes of this motion.[1] Mr. Doe is a resident of Utah. In 2005, Mr. Doe was convicted of sex offenses involving a minor in the United States military court system. He served 13 months of an 18 month sentence for those crimes and was released. He was not placed on parole or supervised release after his incarceration. At no time has Mr. Doe been involved in the Utah state criminal justice system.

---

[1] In their opposition to Mr. Doe's motion for summary judgment, certain Defendants argued that many of these facts should not be taken as undisputed because the only evidence for them is Mr. Doe's verified complaint. Those Defendants, however, have not offered any evidence that calls into doubt Mr. Doe's recitation of the facts.

As a sex offender in Utah, Mr. Doe is required to register in Utah's sex offender registry (the "Registry") pursuant to Utah Code Ann. § 77-27-21.5 (the "Registry Statute"). (*See* Utah Code Ann. § 77-27-21.5(9).) The Registry is administered and maintained by Utah's Department of Corrections (the "UDOC"). Effective July 1, 2008, the Registry Statute requires registrants to provide the following information to the UDOC:

> (i) Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings; [and]
>
> (j) the name and Internet address of all websites on which the sex offender is registered using an online identifier, including all online identifiers and passwords used to access those websites . . .

Utah Code Ann. § 77-27-21.5(12)(i) & (j). The Registry Statute also mandates that the UDOC "require that a sex offender provide to the department any password required for use with an online identifier. Passwords provided to the department may not be disclosed to the public." Utah Code Ann. § 77-27-21.5(2)(c). (The Registry Statute also requires that registrants give other information, including DNA samples, but Mr. Doe has not challenged those requirements.)

The Registry Statute defines "online identifier" as "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet

communication. It does not include date of birth, Social Security number, or PIN number." Utah Code Ann. § 77-27-21.5(1)(j).[2] The Registry Statute makes it a felony if a registrant fails to give the UDOC the information. *See* Utah Code Ann. § 77-27-21.5(14)(a).

On June 23, 2008, Mr. Doe, acting *pro se*, filed this action. Mr. Doe named as Defendants Utah's Attorney General in his official capacity, the UDOC's Executive Director in his official capacity, and the prosecutor and sheriff of every county in Utah, in their official capacities. Mr. Doe alleges that the Registry Statute's required disclosure of his internet identifiers, related websites, and passwords violates the United States Constitution and several constitutional amendments. Mr. Doe's most persuasive argument is that providing the UDOC with his internet identifiers and related websites violates his First Amendment rights. Mr. Doe seeks a declaration that the Registry Statute's requirements are unconstitutional as applied to him and an injunction prohibiting Utah from enforcing those requirements against him.

Along with his complaint, Mr. Doe simultaneously moved for a temporary restraining order. On June 30, 2008, the court held a hearing regarding Mr. Doe's TRO motion. Mr. Doe was represented by his present

---

[2] The term "internet identifier" is not defined, but it appears to be used interchangeably in the Registry Statute with the term "online identifier." The court reads those two terms in the Registry Statute as having the same meaning.

counsel at that hearing. During the hearing, Mr. Doe made an uncontested proffer that on June 27, 2008, he attempted to re-register as a sex offender with the UDOC without providing his internet identifiers, related websites, and passwords. (The court will refer to internet identifiers and the related websites as "internet information.") Mr. Doe further proffered that he was told by UDOC personnel that failing to provide that information would likely result in the issuance of a warrant for his arrest. At the close of the hearing, the court found that Mr. Doe had raised substantial concerns about the constitutionality of the Registry Statute. Accordingly, the court prohibited the Attorney General and UDOC's Executive Director from requiring Mr. Doe to provide his internet information and passwords as part of registering. The court further instructed the sheriffs and prosecutors of Salt Lake and Weber Counties not to arrest or prosecute Mr. Doe under the Registry Statute for not providing that information. (The Defendants subject to the court's injunction shall be referred to hereinafter as the "Defendants.") The court informed Mr. Doe that he was required to provide all other information to the UDOC required by the Registry Statute. The court later issued a written order setting out these instructions. (*See* Dkt. No. 15, Sealed Order.)

On July 21, 2008, Mr. Doe moved for summary judgment on his claims that the Registry Statute violates the Constitution on its face as applied to him. Before responding to Mr. Doe's motion, the Defendants stipulated to an injunction ordering them not to

enforce the password disclosure requirements of Utah Code Ann. § 77-27-21.5(2)(c) & (12)(j) until June 1, 2009. Accordingly, at least for the next several months, the Registry Statute requires that sex offenders must give the UDOC their internet identifiers and the websites where they use those identifiers, but not their passwords.

The parties have also filed other motions. Those are Mr. Doe's Motion to Appoint Counsel (Dkt. No. 4), Mr. Doe's Motion for Service of Process (Dkt. No. 5); Mr. Doe's Motion to Proceed Using a Pseudonym (Dkt. No. 12); Mr. Doe's Motion for a Preliminary Injunction (Dkt. No 10) and the Salt Lake County Prosecutor and Sheriff's Motion to Dismiss (Dkt. No. 27). For the reasons stated below, Mr. Doe's motion for summary judgment (Dkt. No. 19) is GRANTED. Most of the other motions are mooted by this ruling.

ANALYSIS

As noted above, the main issue is whether Utah Code Ann. § 77-27-21.5(12)(i) &(j), requiring Mr. Doe to provide his internet information to the UDOC, violates his constitutional rights. Defendants contend that this dispute is not ripe for review.

I. Ripeness

For the purpose of the ripeness inquiry only, Defendants agree that Mr. Doe has the right to speak anonymously online. But even if he has such a right,

Defendants assert, Mr. Doe has presented no evidence that the UDOC intends to use Mr. Doe's internet information in a manner that would compromise this right. In support of this proposition, Defendants rely primarily on an affidavit by James Ingle Jr., the head of the UDOC's Registry program. In his affidavit, Mr. Ingle states that while the UDOC will use registrants' internet information to investigate crimes, Mr. Ingle does not interpret the Registry Statute as giving the UDOC authority to monitor registrants' non-criminal online behavior, nor does the UDOC engage in such monitoring. (*See* Ingle Aff. at ¶ 12.) Mr. Ingle further states that the UDOC does not disseminate registrants' internet information to the public. (*See id.* at ¶ 13.) At the hearing on Mr. Doe's summary judgment motion, Mr. Ingle proffered that the UDOC would provide any law enforcement entity with registrants' internet information if that entity requested it in relation to a criminal investigation.

Defendants cite *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995), for the proposition that courts assessing ripeness analysis should focus on "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." Defendants conclude that given the Registry administrator's view of the Registry Statute and the UDOC's present limited use and distribution of registrants' internet information, the possibility that the UDOC

will infringe Mr. Doe's protected anonymous speech is remote, making this action not yet ripe for review.

But Defendants' argument is not persuasive. One of Mr. Doe's chief complaints is that the Registry Statute on its face chills his First Amendment right to speak anonymously on the internet. The customary ripeness analysis is "relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought." *Id.* In such cases, the Tenth Circuit uses a three-element ripeness inquiry, considering "(1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review." *Id.* at 1500. Here, these elements all weigh in favor of a conclusion that the controversy is ripe for review.

First, the hardship to Mr. Doe of withholding review is acute because he has been placed in an "immediate and direct dilemma." *Id.* That is, Mr. Doe has the choice between (a) turning over his internet information to the UDOC and facing a well-grounded possibility that his protected online speech will not remain anonymous or (b) refusing to provide his internet information to the UDOC and facing a felony prosecution. Notably, Mr. Doe has made a credible and undisputed proffer that UDOC staff threatened him with arrest and prosecution when he tried to register without providing his internet information. Having a party placed in such a dilemma supports a finding of hardship.

Second, Mr. Doe's willingness to engage in protected online anonymous speech will be lessened by having to provide the UDOC with his internet information under the Registry Statute as it is written. The Registry Statute contains no provision that prevents the UDOC from tracking and linking protected anonymous internet speech to a registrant if the UDOC decides to do so. Nor does the Registry Statute contain any prohibition on the UDOC disseminating registrant's internet information outside the UDOC, raising the real possibility that the information could become public knowledge.[3] Finally, even if the only time that the UDOC provides a registrant's internet information to law enforcement is in response to a request for investigative purposes, there is no limitation on how law enforcement officials may use the information once they have it. Given that there are no restrictions in the Registry Statute on how the UDOC may use or distribute Mr. Doe's internet information, his protected speech is undoubtedly chilled.

Finally, this action involves a facial constitutional challenge to a statute. Consequently, the case is

---

[3] Defendants argue that the Registry Statute does not require the UDOC to make sex offenders' internet information available to the public, which the Defendants view as a prohibition on making such information public. This reading is reasonable, but it is contradicted by Utah Code Ann. § 77-27-21.5(2)(c), which expressly prohibits making passwords available to the public. The bottom line is that there is no provision in the Registry Statute regarding the UDOC's use of the information.

predominated by strictly legal issues. Moreover, the few facts that the court views as relevant to the outcome here have already been established. These considerations weigh in favor of finding this case fit for judicial review at this time. *See id.* at 1499. Because all three factors weigh in favor of ripeness, the court finds that this action is ripe for review.

II. Mr. Doe's First Amendment Right to Anonymous Online Speech

Mr. Doe's most compelling constitutional argument is that the Registry Statute abridges his First Amendment right to speak anonymously online.[4] Neither the court nor the parties have located any federal or state case squarely addressing the question of whether requiring sex offenders to disclose their internet information to a state registry infringes on First Amendment rights.

The lack of authority on this point of law is not surprising. The most common challenges to state sex offender registry statutes have been brought on the questions of whether the laws violate due process or are *ex post facto* laws. *See, e.g., Smith v. Doe*, 538 U.S. 84 (2003). Registry statutes, which have been around

---

[4] Though Mr. Doe technically should have brought this action under 42 U.S.C. § 1983, the court will liberally construe his complaint, which he filed *pro se*, as having pled such a claim. Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1187 (10th Cir. 2003).

for many years, generally survive these challenges. *See id.* However, states have only recently started to enact statutes requiring that sex offenders provide registries with the internet information that Utah requires in the Registry Statute. This trend is no doubt attributable to Congress' passage of the Adam Walsh Child Protection and Safety Act in 2006, Title I of which requires states to maintain registries containing the information enumerated in 42 U.S.C. § 16914 or risk losing federal law enforcement funds. *See* 42 U.S.C. ¶ [sic] 16913 and 42 U.S.C. § 14071. 42 U.S.C.§ 16914 does not name internet identifiers and related websites as a required piece of information for sex offender registries. But the United State [sic] Department of Justice, which has the responsibility of administering the federal statute, published Proposed Guidelines on May 30, 2007, interpreting 42 U.S.C. § 16914 to require sex offenders to provide "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings." The National Guidelines for Sex Offender Registration and Notification, Proposed Guidelines, 72 Fed. Reg. 30210-01, 30220 (May 30, 2007). Given the recency of the Walsh Act and the DOJ's proposed guidelines, this action appears to be one of the first challenges to a registry's internet information requirements on First Amendment grounds.

In sum, the court finds itself in wholly untested legal waters. For guidance, the court has looked to several cases from the Supreme Court, the Tenth

Circuit and other jurisdictions which shed light on the issues involved in this case.

First, it is clear that anonymous speech is a well-established constitutional right. In fact, anonymous political speech is an especially valued right in this nation:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (citations omitted). *See also Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

Likewise, the role of the internet as one of the most important means of communication available to citizens to express protected speech is beyond question:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio,

> video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) (citation omitted). Based in large part on the importance and unique nature of the internet as a virtual "marketplace of ideas," the *Reno v. ACLU* Court struck down a federal law aimed at preventing the criminals from targeting children with sexually explicit materials over the internet. *Id.* at 885.

Courts have combined these two concepts to hold that the First Amendment protects anonymous online speech. In *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998), the court evaluated the likelihood of success of a constitutional challenge to a New Mexico statute aimed at protecting children from online sexual solicitation. The court noted that "[r]equiring age verification before providing access to speech on the Internet would bar many people from accessing important information – such as gynecological information – anonymously." *Id.* at 1032. The court concluded, among other things, that the statute "violates the First and Fourteenth Amendments of the United States Constitution because it prevents people from communicating and

accessing information anonymously." *Id.* at 1033 (citing *McIntyre*, 514 U.S. at 357 and *Talley*, 362 U.S. at 65). Applying exacting scrutiny to the statute, the court concluded that there was a substantial likelihood that the statute would be held unconstitutional. *See* 4 F. Supp. 2d at 1034. The court therefore granted a preliminary injunction barring its enforcement. *See id.*

The Tenth Circuit affirmed the district court's granting of the injunction in *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). In its decision, the Tenth Circuit noted, but did not specifically address, the district court's ruling that a bar on anonymous internet speech violates the First Amendment. *See* 194 F.3d at 1155-56 (10th Cir. 1999).

Similarly, in *American Civil Liberties Union of Ga. v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997), the court reviewed a Georgia statute that made it a crime for individuals to use false names on the internet. A group of plaintiffs sued to enjoin the enforcement of the statute, arguing that it "impos[ed] unconstitutional content-based restrictions on their right to communicate anonymously and pseudonymously over the internet." *Id.* at 1230. The court agreed with the plaintiffs, reasoning that "the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude." *Id.* at 1232 (quoting *McIntyre*, 514 U.S. at 340-42). After subjecting the Georgia statute to exacting scrutiny, the court concluded that the plaintiffs had shown a substantial

likelihood that they would prevail on their claim that the statute violated the First Amendment. *See id.* at 1234-35.

Internet anonymity has been shielded by courts in other contexts as well. For example, in *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092, the court reasoned that:

> Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." People who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court.

The *2TheMart.com* court outlined strict rules for allowing a subpoena that had the effect of unmasking the identity of anonymous online speakers, explaining:

> The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale. For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.

Id. at 1097.

Defendants do not directly challenge the right to anonymous speech online. Instead, they contend that because he is a sex offender, Mr. Doe has relinquished that right. Defendants cite cases in various other contexts that have approved curtailing the constitutional rights of sex offenders and felons. Defendants do not cite any authority, however, supporting the proposition that a sex offender who has completed his prison term and is not on parole or probation gives up First Amendment rights.

A review of various federal cases leads the court to conclude the [sic] Mr. Doe has not given up his right to anonymous internet speech because of his status as a sex offender. Two cases in particular stood out in this review. First, the United States Supreme Court has held that even people in custody have First Amendment rights, although restrictions on those rights are scrutinized under a low standard. *See Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (allowing a restriction on prisoners' First Amendment rights only "if it is reasonably related to legitimate penological interests"). Second, the Tenth Circuit has ruled that a complete, unconditional ban on internet access as a condition of supervised release is overly broad and impermissible. *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001).

Notably, the released prisoner who would have been subject to the ban in *White* was a repeat sex offender who had used the internet to order child pornography. *See id.* at 1201. In rejecting a condition of release that appeared to completely ban the

released prisoner's access to the internet, the court noted several innocent uses that the released prisoner could make of the internet, such as doing research, checking the weather and reading a newspaper. *See id.* at 1206. The court accordingly reads *White* as a caution that care must be used in restricting the rights of even of [sic] potentially dangerous criminals on supervised release.

The court's conclusion that Mr. Doe retains his right to anonymous online speech is bolstered by the fact that Mr. Doe is not on parole or subject to supervised release. Restrictions on the rights of parolees and those on supervised release are subject to different analysis, which this order does not undertake. *See, e.g., United States v. Vinson*, 147 Fed. Appx. 763, 774 (10th Cir. 2005) (upholding condition of release prohibiting internet access without probation officer's approval.) As has been made clear throughout this order, the court's analysis is limited to the Registry Statute as applied to Mr. Doe.

Having concluded that Mr. Doe has the right to speak anonymously online, the next question for the court is whether the Registry Statute impermissibly limits that right.[5]

---

[5] Defendants also argue that UDOC will only use registrants' internet information to monitor criminal conduct, and that criminal conduct is not protected by the First Amendment. Criminal conduct is certainly not protected by the First Amendment. But there is nothing in the Registry Statute that prevents the UDOC from using the information to reveal the

(Continued on following page)

III. Exacting Scrutiny Analysis

The court believes that the Registry Statute burdens Mr. Doe's right to anonymous online speech. If Mr. Doe provides the UDOC with his internet information and knows that there are no statutory limits on how that information can be used by the UDOC or others, he is less likely to engage in protected anonymous speech online. Of course, finding that the Registry Statute infringes on protected speech does not automatically mean that the statute is unconstitutional.

There are two levels of scrutiny courts apply in analyzing restrictions on protected speech: exacting scrutiny, which is used when the statute is content-based, and intermediate scrutiny, which is applied to content-neutral statutes. *See Golan v. Gonzales*, 501 F.3d 1179, 1196 (10th Cir. 2007). "Content-based restrictions on speech are those which 'suppress, disadvantage, or impose differential burdens upon speech because of its content.'" *Id.* (citation omitted). The court believes that the Registry Statute is content-based, as it requires registrants to reveal their true identities to the UDOC with no assurance that their protected online speech will remain anonymous. *See ACLU of Ga. v. Miller*, 977 F. Supp. at 1232 ("[B]ecause 'the identity of the speaker is no different

---

identity of a registrant who has spoken anonymously online in a non-criminal manner, or to release the information to others who wish to do so.

from other components of [a] document's contents that the author is free to include or exclude,' the statute" prohibition of internet transmissions which 'falsely identify' the sender constitutes a presumptively invalid content-based restriction.") (citation omitted). Accordingly, the court will apply exacting scrutiny to the Registry Statute. *See ACLU v. Johnson*, 194 F.3d at 1156 ("The Court made clear in *Reno v. ACLU*, 521 U.S. at 870 . . . that content-based regulation of Internet speech is subject to . . . strict scrutiny.") (footnote omitted).

Under exacting scrutiny, "the government may 'regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.'" *ACLU v. Johnson*, 194 F.3d at 1156 (quoting *Sable Commc'ns, Inc. v. Federal Commc'ns Comm'n.*, 492 U.S. 115, 126 (1989)). Here, Utah undoubtedly has a compelling interest in protecting children from internet predators and investigating online crimes, which are the stated goals of the Registry Statute. *See, e.g., Sable*, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."). The Registry Statute appears to achieve these ends. For example, if the UDOC makes sex offenders' internet information immediately available to investigators, investigations into potential crimes originating online could be hastened. Moreover, knowing that police will have their internet information would probably discourage some sex

offenders from using the internet to help them commit crimes.

The only question, then, is whether the Registry Statute's disclosure requirements are the least restrictive means available to meet these goals. They are not. With no restrictions on how the UDOC can use or disseminate registrants' internet information, the Registry Statute implicates protected speech and criminal activity alike. An alternative statute that contained such restrictions would be similarly effective and less threatening to protected anonymous speech.

The Defendants argue that court should narrowly construe the Registry Statute as allowing the UDOC to use internet information for criminal investigations only, and as prohibiting dissemination of that information to the public. In other words, the Defendants maintain that the Registry Statute already contains the restrictions identified by the court, and so it should be found constitutional.

It is true that "in determining a facial [First Amendment] challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." *ACLU v. Johnson*, 194 F.3d at 1159 (citation omitted). But if the court is to engage in such a construction, the "key . . . is that the statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Id.* (citation omitted). The court does not view the Registry

Statute as readily susceptible to a construction that imposes restrictions on internet information. For example, Defendants point to Utah Code Ann. § 77-27-21.5(2)(b) as a requirement that internet information be kept private. But § 77-27-21.5(2)(b) is an instruction to make certain information public, not a prohibition on making internet information private. Because the court would have to rewrite the Registry Statute to include limitations on how Mr. Doe's internet information will be treated to preserve its constitutionality as applied to him, the Registry Statute is not saved by narrow construction.

The court is mindful of the importance of the Utah legislature's goals in passing the Registry Statute. The court notes, however, that investigators of internet crime already have tools to unmask anonymous internet suspects, such as investigative subpoenas. If Utah wants the additional benefit of having Mr. Doe's internet information available on its Registry strictly for law enforcement purposes, it will not be difficult to amend the Registry Statute to that effect.

Based on the above, the court holds that the Registry Statute on its face violates the First Amendment as applied to Mr. Doe. The Fourteenth Amendment protects Mr. Doe's First Amendment rights from abridgement by Utah statute. Accordingly, the court grants summary judgment in Mr. Doe's favor and enjoins the Defendants from enforcing the disclosure requirements of Utah Code Ann. § 77-27-21.5(12)(i) & (j) against him.

Given this ruling, there is no need to address Mr. Doe's arguments under the Fourth Amendment or the *ex post facto* clause of the Article I, Section 10 of the United States Constitution.

IV. Other Outstanding Motions

While the court has allowed Mr. Doe to proceed under a pseudonym as a practical matter, it has not yet formally ruled on is motion to be allowed to do so. Because of the potential repercussions that Mr. Doe might face based on his bringing of this successful suit, the court grants his motion. All other pending motions are rendered moot by this Order.

ORDER

For the reasons set forth above, the court ORDERS as follows:

Mr. Doe's Motion to Appoint Counsel (Dkt. No. 4) is DENIED as moot;

Mr. Doe's Motion for Service of Process (Dkt. No. 5) is DENIED as moot;

Mr. Doe's Motion for a Preliminary Injunction (Dkt. No. 10) is DENIED as moot;

Mr. Doe's Motion to Proceed Under Pseudonym (Dkt. No. 12) is GRANTED;

Mr. Doe's Motion for Summary Judgment (Dkt. No. 19) is GRANTED and

the Motion to Dismiss of the Salt Lake County Sheriff and Prosecutor (Dkt. No. 27) is DENIED as moot.

All named Defendants are hereby ENJOINED from enforcing the disclosure requirements of Utah Code Ann. § 77-27-21.5(12)(i) & (j) against Mr. Doe. The enjoined parties should refer to the court's Sealed Order of June 30, 2008 (Dkt. No. 15) to ascertain Mr. Doe's real identity.

SO ORDERED this 25th day of September, 2008.

BY THE COURT

/s/ Tena Campbell
TENA CAMPBELL
Chief District Judge